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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

SMALL LANDOWNERS OF OAHU, and RICHARD S. H. WONG, OSWALD K. STENDER, MARION M. L. LINDSEY, GERARD A. JERVIS, and HENRY H. PETERS, in their capacities as Trustees of the Kamehameha Schools Bernice Pauahi Bishop Estate,

Petitioners,

v.

CITY AND COUNTY OF HONOLULU,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether deferential, rational-basis review is appropriate for all compensated takings of private property, even when the taking does not alter the use of the property or produce any social surplus; the lawmaking body at issue is a local, rather than state, government; and the compensation is provided not from public funds but from the private parties for whose benefit the expropriation is being made.

2. Whether this Court's decision in *Hawaii Housing Authority* v. *Midkiff*, 467 U.S. 229 (1984), should be limited to the extent it suggests that deferential, rational-basis review is appropriate for all compensated takings of private property.

LIST OF PARTIES

The parties to the proceeding before the United States Court of Appeals for the Ninth Circuit whose judgment is sought to be reviewed herein are as follows:

City and County of Honolulu, Hawaii
Hale Coalition
Gerard A. Jervis, as Trustee of the Kamehameha Schools Bernice Pauahi Bishop Estate
Marion M. L. Lindsey, as Trustee of the Kamehameha Schools Bernice Pauahi Bishop Estate
Henry H. Peters, as Trustee of the Kamehameha Schools Bernice Pauahi Bishop Estate
William S. Richardson, as Trustee of the Kamehameha Schools Bernice Pauahi Bishop Estate
Small Landowners of Oahu
Oswald K. Stender, as Trustee of the Kamehameha Schools Bernice Pauahi Bishop Estate
Matsuo Takabuki, as Trustee of the Kamehameha Schools Bernice Pauahi Bishop Estate
Myron B. Thompson, as Trustee of the Kamehameha Schools Bernice Pauahi Bishop Estate
Richard S. H. Wong, as Trustee of the Kamehameha Schools Bernice Pauahi Bishop Estate

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner states the following:

Petitioner Small Landowners of Oahu is a Hawaii nonprofit corporation that has no corporate parents or nonwholly owned subsidiaries. Petitioners Wong, Stender, Lindsey, Jervis, and Peters are the Trustees of the Kamehameha Schools Bernice Pauahi Bishop Estate, a charitable trust that erects and maintains schools for the education of children, giving preference to indigents and orphans who are Native Hawaiians. Kamehameha Schools Bernice

Pauahi Bishop Estate has no corporate parents. Its non-wholly owned subsidiaries are as follows:

Montrose Land Acquisition, L.P.
Meridian Associates, L.P.
Southern Nevada Income Properties, L.P.
Sino Finance Group, L.L.C.
Unison Pacific Investment (U.S.), Ltd.
Montrose Erwin Square Investors, L.P.
Erwin Square, L.P.
Greensview Associates, L.P. I and II
CONAM Harbor Point Associates, L.P.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Small Landowners of Oahu and Richard S. H. Wong, Oswald K. Stender, Marion M. L. Lindsey, Gerard A. Jervis, and Henry H. Peters, in their capacities as Trustees of the Kamehameha Schools Bernice Pauahi Bishop Estate, respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-40a) is reported at 124 F.3d 1150 (9th Cir. 1997). The orders denying rehearing and rehearing *en banc* are reproduced at Pet. App. 100a-102a. The opinions of the district courts that decided constitutional challenges to Honolulu's condominium leasehold conversion and rent control ordinances, and whose judgments were reviewed on a consolidated basis by the court of appeals (Pet. App. 41a-99a), are reported at 802 F. Supp. 326 (D. Haw. 1992) and 832 F. Supp. 1404 (D. Haw. 1993). The orders entering final judgment in those cases following the Hawaii Supreme Court's decision of a certified state law question are reproduced at Pet. App. 103a-104a.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit rendered its judgment and opinion on September 8, 1997. Petitioners timely filed petitions for rehearing and suggestions for rehearing en banc on September 18, 1997. The court of appeals denied the petitions on March 6, 1998. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Takings Clause of the Fifth Amendment provides:

> [N]or shall private property be taken for public use without just compensation.

U.S. Const. amend. V.

The statutory provision involved is Honolulu City & County Ordinance No. 91-95 (Dec. 18, 1991), which is reproduced at Pet. App. 105a-136a.

STATEMENT OF THE CASE

This case concerns the nature and extent of judicial enforcement of the public use requirement of the Fifth Amendment's Takings Clause. Relying on this Court's decision in *Hawaii Housing Authority* v. *Midkiff*, 467 U.S. 229 (1984), which held that compensated takings are to be accorded near-absolute deference by reviewing courts, the Ninth Circuit below upheld respondent City and County of Honolulu's use of its eminent domain power to force the owners of land underneath condominium buildings on O'ahu [1] to sell that land to their lessees, the owners of the condominium units. The City's action merely enabled ownership to be transferred from one (unwilling) private party to another (enthusiastic) one; it had no effect on the use or value of the land. Yet, the Ninth Circuit upheld the taking on the theory that it might rationally be thought to help lower the price of land on O'ahu, and thereby benefit the overall economy, by dispersing ownership of fee interests more widely.

The Ninth Circuit applied rational basis review and upheld the taking of petitioners' land even though (1) the taking effected no change in the use of the land; (2) there was no finding of oligopolistic or economically significant concentrated land ownership; (3) the ordinances were passed by a local governmental body riven with conflicts of interest; and (4) no public funds were to be used to pay the required just compensation; instead, all of the funding for the takings, including compensation and the City's administrative costs, was to be provided by the lessees who are the direct beneficiaries of the seizures.

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[1] For purposes of this petition, "condominium" refers to condominium property regime developments, cooperative housing corporation developments, and planned unit developments, all three of which are the subject of the ordinance at issue. The entire island of O'ahu is within the City and County of Honolulu.

Each of these factors undermines the normal logic of deferring to a legislative exercise of eminent domain power and gives rise to a heightened risk that a compensated taking serves only the private interests of an electorally powerful special interest group, rather than the interests of the public at large. With this heightened risk should come heightened judicial scrutiny. While the Ninth Circuit's ruling did not contradict this Court's decision in *Midkiff*, its ruling does conflict with the Fifth Amendment, because applying deferential, rational-basis review to all compensated takings, regardless of circumstances, virtually guarantees that private property will sometimes be taken for private rather than public use, as it was here. Petitioners therefore respectfully request that this Court grant review to reconsider the sweep of its holding in *Midkiff* and clarify that closer judicial scrutiny of compensated takings is warranted in at least some circumstances.

1. Petitioner Small Landowners of Oahu ("SLO") is a Hawaii non-profit corporation, which was formed in part to protect the rights of small landowners in connection with Honolulu's efforts to force them to sell their land through the lease-to-fee conversion ordinance at issue in this petition. It consists of persons or entities who own land under only a single condominium building. Many of these individuals are Native Hawaiians of modest means whose families have owned their land for generations. SLO's members are representative of the vast majority of property owners who are subject to having their land taken under the ordinance at issue.

2. Petitioners Wong, Stender, Lindsey, Jervis, and Peters are the trustees of the Kamehameha Schools Bernice Pauahi Bishop Estate ("Kamehameha Schools"). Kamehameha Schools is a charitable trust established in 1884 under the will of Ke Ali'i Bernice Pauahi Bishop, the great-granddaughter of King Kamehameha I, the founder of the Hawaiian Kingdom. Its purpose is to erect and maintain schools for the education of children, giving preference to indigents and orphans who are Native Hawaiians. Its assets consist in large part of Hawaiian

real estate originally bequeathed to it by Bernice Pauahi Bishop and include the land underlying approximately 15% of the leasehold condominium units on O'ahu. Kamehameha Schools is the largest single landholder affected by the ordinance.

3. Between 1962 and 1989, the members of SLO and Kamehameha Schools made their land available to real estate developers so that condominium housing could be built on O'ahu. Petitioners were willing to allow development of their land, but they did not wish to sell it, in some cases because of close and enduring familial ties to the land and in many instances because the land constitutes a stable, long-term investment. Petitioners accordingly demised their interests under long-term ground leases, pursuant to which they would retain title to the land underneath the buildings and would receive rent from the buildings' owners. Typical ground leases carried lease terms of 55 years or longer, with ground rents fixed for the first 25 to 30 years. Because land values were expected to change over time, the leases provided for periodic adjustment of the ground rent according to contractual formulas. Generally, the leases provided for the new rents to be fixed at between six and eight percent of the appraised value of the unimproved land.

Like a home financed through an adjustable-rate mortgage, a condominium purchased subject to a ground lease of this kind carries with it an element of financial risk. Any condominium purchaser who does not wish to accept this risk is free to pay more for a condominium that holds fee title to the appurtenant land. Those who choose to purchase leasehold condominiums know that their ground rents are subject to change when the initial fixed-rent lease term expires.

Rents under these ground leases began to reset in the late 1980s. Not surprisingly, the adjusted rents exceeded the initial fixed rate. The value of land on the Hawaiian islands had appreciated substantially during the 1970s and 1980s, due to both its inherent scarcity and its desira-

bility to residents, vacationers, and investors. During the final years of the initial lease term, lessees had reaped economic windfalls, as their ground rents were substantially below market value. When the rents began to reset, the lessees' windfalls disappeared, and they became obligated to pay market rates.

Faced with these circumstances, dissatisfied condominium owners began a campaign to enact legislation that would force the ground lessors to sell their land to the lessees.[2] Such legislation would enable the class of lessees, who dramatically outnumber the class of lessors, to substitute a valuable and appreciating asset for their contractual liability to pay increased ground rents.

4. In response to the lessees' efforts, the City Council of Honolulu passed Ordinance No. 91-95. It was passed by a 5-4 margin on December 18, 1991, as part of a two-pronged assault on owners of condominium land in Honolulu.[3] The ordinance authorizes the City and County of Honolulu, through its Department of Housing and Community Development ("the Department"), to strip the fee interests from the owners of the land lying beneath condominiums on O'ahu and transfer those interests to individuals who had previously been paying ground rent to the owners. Pet. App. 105a-136a.

The ordinance became law without the signature of the Mayor, who refused to sign the bill because he was concerned about its constitutionality and because he believed a measure of this kind should be passed only by the state legislature, which had previously considered and rejected

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[2] The vast majority of condominium owners on O'ahu do not use the condominiums as their principal dwelling; a study performed at the State of Hawai'i's behest in 1987 found that 66% of the units belonged to non-occupant investors. Pet. App. 165a.

[3] The companion ordinance, No. 91-96, which imposed a ceiling on renegotiated ground rents for owner-occupied residential condominiums on O'ahu, was struck down as facially invalid under the Takings Clause by the district court. Pet. App. 43a-65a. That ruling was affirmed on appeal and is not at issue in this petition. Pet. App. 25a-31a.

similar legislation on numerous occasions. Pet. App. 171a-172a. All nine members of the City Council who passed Ordinance 91-95 were reported to have conflicts of interest on the subject of condominium leasehold conversion; four of the five who voted in favor of the ordinance were themselves condominium lessees. Pet. App. 173a (Doo, Felix, Gill, and Holmes).

Under the terms of the ordinance, the process of lease-to-fee conversion is initiated only at the request of the lessees and operates exclusively for their benefit. The City does not itself select properties for condemnation or decide to begin the eminent domain process; instead, the process is set in motion when the owners of 25 condominium units, or 50% of the total units in a building, whichever is less, apply to the Department to purchase their leased-fee interests. Pet. App. 117a (§ 2.2(a)(1)). After the Department formally decides to proceed, Pet. App. 118a (§ 2.2(a)(2)), it must initiate condemnation proceedings within twelve months unless the lessees and lessors voluntarily agree to a sale. Pet. App. 131a (§ 5.2).

The private lessees pay the full amount of compensation owed as a result of the takings. Although the City initially acquires the land, the lessees are obliged to purchase it from the City within 60 days. Pet. App. 118a (§ 2.3). In addition, the lessees are required to pay the City's allocated overhead and administrative costs associated with the seizures, including the salaries of City employees administering the program. Pet. App. 118a-130a; 142a-158a.[4] Under the scheme put in place by the ordinance and its associated rules, therefore, the takings require no expenditure of public funds, and the only taxpayers who bear the cost of the condemnations are those who personally benefit from them.

5. The legislative findings supporting the enactment recite that there is a "continuing housing crisis" on O'ahu,

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[4] *See* Ordinance 91-95 §§ 2.3, 2.5, 3.3, 3.5, 4.2, 4.3, 4.5; Rules for Residential Condominium, Cooperative and Planned Development Leasehold Conversion §§ 1-2, 2-18 (Sept. 28, 1993).

one of whose features is the "increased lease rent[]" due from the owners of leasehold condominiums to their ground lessors under the reset terms of the long-term ground leases. Pet. App. 106a. The findings explain that these increased rents are a function of "acute recent inflation of land costs" on O'ahu. Pet. App. 106a. The ordinance makes no mention of the scarce supply of land on the island of O'ahu or its attractiveness in the international real estate market, instead assigning blame for the "[r]unaway land prices" to the ground lessors who own the land. Pet. App. 105a. According to the City's tautological formulation, "[o]wnership of land beneath . . . [condominiums] . . . is concentrated in the hands of the owners of such land." Pet. App. 105a. The findings assert that "the refusal of such landowners to sell proportionate shares in their fee simple titles to their lands to such lessees . . . has resulted in a serious shortage of fee simple residential condominium land . . . and in an artificial inflation of the value of such land on Oahu." Pet. App. 106a.

The City Council did not find that a cartel or oligopoly existed in the O'ahu condominium market. Indeed, it expressly acknowledged that "market conditions or other factors" could be responsible for the increasing land prices. Pet. App. 107a. In fact, ownership of fee interests beneath condominium buildings was far from concentrated in economic terms: according to a statewide study prepared for the Hawai'i legislature in 1987, 466 different landowners owned the land underneath 754 condominium buildings; 89%, or 415, of those landowners held the fee underneath just a single building. Pet. App. 162a.

Moreover, the record established without contradiction that, by the time the ordinance was passed, the owners of the land beneath more than 15,000 leasehold condominium units, including Kamehameha Schools, had voluntarily agreed to sell fee interests to their lessees. Pet. App. 174a-178a. Indeed, by the end of 1991, approximately 50% of the total number of condominium units on O'ahu were fee, rather than leasehold, units. The ordinance decries what it terms the "exorbitant leased fee purchase prices"

paid in these voluntary transactions, but this is a complaint about the affordability, not availability, of fee interests. Pet. App. 106a.

In the end, the ordinance simply states that the "lessees have been forced to accept long-term leases or renewed leases . . . which contain terms and conditions that are financially disadvantageous to them." Pet. App. 106a. It concludes by declaring that "[t]he use of the City's eminent domain power to condemn the fee simple title . . . for the purpose of making proportionate shares of the fee simple title . . . available for acquisition" by the lessees "is for a public use and purpose." Pet. App. 108a.

6. Kamehameha Schools filed suit challenging the constitutionality of the ordinance the same day it was passed. The Small Landowners filed several months later; after a motion to consolidate or, in the alternative, to intervene was denied, the SLO suit proceeded separately. Among the claims raised by both sets of petitioners was that Ordinance 91-95 effected an unjustified and unlawful taking of private property in violation of the public use requirement of the Takings Clause. In support of this claim, petitioners introduced considerable evidence into the district court record regarding the characteristics of the O'ahu condominium market, the history of lease-to-fee conversion efforts in Hawai'i, and the circumstances surrounding passage of the Honolulu ordinance. The City relied on the bare recitation of legislative findings in the ordinance and adduced no evidentiary support for the ordinance.

Both district courts upheld Ordinance 91-95 against petitioners' takings claim. Both relied on this Court's decision in *Hawaii Housing Authority* v. *Midkiff*, 467 U.S. 229 (1984), which had upheld the constitutionality of a property conversion statute relating to single-family homes passed by the Hawai'i state legislature. Based upon the highly deferential standard of review articulated in *Midkiff*, the district courts held that they were precluded from engaging in any meaningful review of the City Council's

legislative findings or of the basis or purpose of the Council's use of the eminent domain power to transfer ownership of the leased fee interests from petitioners to the lessees. Pet. App. 70a; Pet. App. 89a-94a. The district courts acknowledged that there was no oligopoly of condominium land ownership on O'ahu, but nevertheless held that they were obliged to defer to the City's determination that forcibly taking the lessors' land in order to give it to the lessees constituted a proper public purpose. Pet. App. 70a; Pet. App. 89a-94a.

7. The Ninth Circuit affirmed. Petitioners sought to avoid application of *Midkiff* on the ground that the condominium market on O'ahu was not oligopolistic; that public funds were not used to effect the taking; that the ordinance was enacted by a local government, rather than the state legislature; and that the City Council's findings were unsupported by facts. The Ninth Circuit found no basis for distinguishing *Midkiff*, however, holding that "the standard of review to be used in examining Ordinance 91-95 is the minimum scrutiny test espoused in *Midkiff*" and resolving to "defer to the City's determination regarding public use unless the use involves an 'impossibility' or is 'palpably without reasonable foundation.'" Pet. App. 13a (quoting *Midkiff*, 467 U.S. at 240-41).

Under that standard, the Ninth Circuit upheld Ordinance 91-95. It acknowledged that "[u]nlike the statute at issue in *Midkiff*, the Ordinance is not grounded on the desire of breaking up a land oligopoly," Pet. App. 13a, but it held that the City's stated goal of "remedying a failure in the real estate market and strengthening the economy" was a valid public purpose. Pet. App. 14a. In response to petitioners' showing that there was no failure in the real estate market because the market was not concentrated, approximately 50% of condominiums were owned in fee, and there was a steady stream of voluntary lease-to-fee conversions, the Ninth Circuit simply declared that the evidence was "conflicting," and that the City Council was entitled to conclude "that the land underneath the condominiums was not being sold and that the

lack of such sales was driving up the price of housing in Honolulu." Pet. App. 15a-16a. In any event, the court held, under *Midkiff*, it would be a sufficient justification for the ordinance that it would allow lessees who "cannot afford the renegotiated rent" to purchase their fees and remain in possession of their condominiums. Pet. App. 17a.[5]

Judge O'Scannlain wrote separately "to express concern about" *Midkiff*. Pet. App. 32a. Judge O'Scannlain opined that the lack of oligopoly or economically significant concentration in the O'ahu condominium market meant that "the ordinance is nothing more than a naked transfer from one property owner to another—from landlords to tenants." Pet. App. 37a. In his view, "Ordinance 91-95, unlike the statute in *Midkiff*, is a purely private taking." Pet. App. 36a. Nonetheless, he "reluctantly concur[red] in the court's conclusion that it does not violate the Public Use Clause," because he felt that, under *Midkiff*, he was compelled to find that the ordinance "barely passes muster." Pet. App. 37a. Given that *Midkiff* obliged him to validate what he believed to be an unconstitutional private taking, he expressed the hope that "the Supreme Court will have the opportunity to extend its emerging takings jurisprudence to protect the right to exclude and to add vitality to the public use requirement." Pet. App. 36a.

REASONS FOR GRANTING THE PETITION

In *Midkiff*, this Court articulated a standard of judicial scrutiny for compensated takings that virtually eliminated meaningful judicial oversight of legislative exercises of eminent domain power. To be sure, the deferential mode of review prescribed in *Midkiff* is appropriate for the vast majority of compensated takings, because the post-taking use of the property and the process by which the property

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[5] That the Court was prepared to entertain the notion that a lessee could not afford the renegotiated rent but could nonetheless afford the much higher costs associated with purchasing the fee interest demonstrates just how constrained the Court felt by the deference standard in *Midkiff*.

is taken provide strong circumstantial guarantees of public use. Nevertheless, such deference is *not* appropriate in all cases. Particularly where, as here, a local governmental body enacts a law that forces one private party to sell its property to another private party, and the private buyer pays the full cost of the taking and makes no change in the use of the property acquired, the danger that the taking represents a legislative capitulation to the wishes of a politically powerful private interest, rather than a legitimate effort to benefit the public, is acute. Application of *Midkiff* in such circumstances results in systematic underenforcement of the Fifth Amendment's guarantee that private property will be taken by the government only for a bona fide "public use." This Court should grant review of the decision below in order to refine the *Midkiff* rule and clarify that heightened scrutiny of compensated takings is appropriate in certain circumstances. Because of the existence of *Midkiff* itself, no split in authority on this issue is possible; only through an exercise of this Court's certiorari jurisdiction can full enforcement of the Takings Clause in the eminent domain context be restored.

I. THIS COURT'S RULING IN *MIDKIFF* IS OVERBROAD AND SHOULD BE REVISITED.

1. The public use requirement of the Fifth Amendment's Takings Clause[6] establishes a fundamental principle of American constitutional law, recognized from the earliest years of the republic: government may not enact "a law that takes property from A. and gives it to B." *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (Chase, J.). Even when fully compensated, a taking of private property is constitutionally invalid unless it serves a "pub-

[6] The Fifth Amendment provides in pertinent part: "nor shall private property be taken for public use without just compensation." U.S. Const. amend. V. This provision applies to the states through the Fourteenth Amendment and also governs municipal exercise of eminent domain powers delegated from the states. *See Missouri Pac. Ry.* v. *Nebraska*, 164 U.S. 403, 417 (1896); *Chicago, Burlington & Quincy R.R.* v. *City of Chicago*, 166 U.S. 226, 233-41 (1897).

lic use." See *City of Cincinnati* v. *Vester*, 281 U.S. 439 (1930). By placing limitations on even compensated takings, the public use requirement protects the right of property owners to exclude others and remain in possession of their property, which is " 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.' " *Dolan* v. *City of Tigard*, 512 U.S. 374, 384, 393 (1994) (quoting *Kaiser Aetna* v. *United States*, 444 U.S. 164, 176 (1979)).

In *Hawaii Housing Authority* v. *Midkiff*, 467 U.S. 229 (1984), this Court interpreted the public use requirement narrowly, leaving the important possessory interests of private landowners with little, if any, judicial protection against compensated expropriations. In particular, *Midkiff* erected a virtually irrebuttable presumption that a law providing for an exercise of eminent domain power serves a public purpose.

Midkiff involved a Hawai'i statute that was the direct predecessor of the ordinance at issue in this petition. There, the Hawai'i state legislature enacted a lease-to-fee conversion program for single-family homes throughout the Hawaiian islands. The legislature's action was designed to "correct deficiencies in the market determined by the state legislature to be attributable to land oligopoly" that traced its roots back to Hawai'i's feudal system of land tenure under its monarchs.[7] *Id.* at 243.

The *Midkiff* Court held that "[t]he public use requirement is . . . coterminous with the scope of a sovereign's police powers." *Id.* at 240. In other words, any objective the government might otherwise lawfully pursue could be pursued through the use of a compensated taking. The Court mandated that "deference to the legislature's 'public use' determination is required 'until it is shown to involve an impossibility,' " *id.* (quoting *Old Dominion Co.* v. *United States*, 269 U.S. 55, 66 (1925), or unless it is

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[7] The Court noted that "22 landowners owned 72.5% of the fee simple titles" on O'ahu. *Midkiff*, 467 U.S. at 232.

" 'palpably without reasonable foundation.' " *Id.* at 241 (quoting *United States* v. *Gettysburg Elec. Ry.*, 160 U.S. 668, 680 (1896)). This deference applied not only to the legislature's definition of what constituted a public use, but also to the means chosen to pursue it and the factual support relied on. See *id.* at 242-43. As long as a condemnation was "rationally related to a conceivable public purpose," the Court declared, it would not be disturbed. *Id.* at 241. Because "[r]egulating oligopoly and the evils associated with it is a classic exercise of a State's police powers," *id.* at 242, and the means chosen by the state to address the problem were not "irrational," *id.*, the Court upheld the taking.

2. Petitioners do not challenge the ruling in *Midkiff* as applied to the facts before it: oligopoly is a classic market failure that is properly addressed through redistribution. Nevertheless, the language of the opinion in *Midkiff* swept too broadly. In particular, the opinion failed to acknowledge that not all compensated takings are the same. The opinion made no allowance for the possibility that certain exceptions to the rule of judicial deference might be appropriate; in so doing, it has prevented the lower courts, like the Ninth Circuit below, from properly taking account of circumstances in which more muscular judicial review is warranted to prevent unconstitutional private-purpose condemnations.

For the vast majority of compensated takings, the logic of *Midkiff* is correct and its rule of deferential judicial review is appropriate. When the government takes land for itself, a public use exists almost by definition. When land is taken for a private party who intends to change its use —as, for example, where a utility right-of-way is condemned—then the existence of a measurable increase in the economic productivity of the land demonstrates the existence of a social benefit. And the procedural aspects of the typical taking, including passage by a diverse, bicameral legislature and the payment of compensation from the public fisc, provide circumstantial guarantees that the

eminent domain power has been exercised for a lawful public purpose.

But in other circumstances, the normal presumption of regularity and public purpose associated with a compensated taking is unwarranted. There are a number of objective factors, all of which are present in this case and most of which were not present in *Midkiff*, that greatly increase the risk that an exercise of eminent domain power represents an illegitimate redistribution of property for private gain, rather than a taking for public use. Where some or all of these factors are present, the federal courts should be able to scrutinize legislative enactments more closely than *Midkiff* currently allows; otherwise, unconstitutional takings will be upheld as the courts are forced to defer to pretextual or insubstantial public use claims.

a. *Lack of social surplus.* The first and perhaps most significant factor is the lack of an obvious social surplus associated with the taking. Most compensated takings produce a measurable and apparent increase in social welfare. See Thomas W. Merrill, *The Economics of Public Use*, 72 Cornell L. Rev. 61, 82 (1986) ("The basic model posits that eminent domain is designed to increase social wealth by facilitating certain transactions that otherwise would not take place, or that would take place only at an inefficiently high cost. Eminent domain, to use a familiar metaphor, is an instrument for increasing the size of the pie."). In most cases, that is because the condemned property is being taken in order to change the use to which it is put. See, *e.g.*, *Berman* v. *Parker*, 348 U.S. 26 (1954) (slum clearance designed to alter use of the land). When the property taken is more valuable in the hands of the condemnor than the condemnee, overall social welfare and economic productivity are enhanced. The classic example is an oil pipeline: the individual subsurface easements have virtually no value prior to the taking, but, in the hands of the pipeline company, the right-of-way becomes an extremely valuable economic asset.

Where a taking creates no social surplus, a legislative finding that the taking is for a "public use" is inherently suspect. A social surplus is especially unlikely to exist where the eminent domain power is used to transfer property to a private party that does not intend to put it to a different or more productive use than the previous owner. The absence of a change in the use of the property or any other obvious source of social surplus means that there is a significant chance that the taking in question simply represents a constitutionally forbidden seizure of property from one private party in order to give it to another. Under these circumstances, courts should not slavishly defer to any conceivably rational reason a legislature might put forward for engaging in the taking; instead, they should be able to ensure that the taking actually serves a public purpose.

b. *Lack of public funds to pay compensation.* The second factor that counsels in favor of heightened judicial scrutiny of a compensated taking is the absence of public funding for the compensation award. When tax dollars are used to provide compensation, the taxpayers themselves can be expected to act through the political process to ensure that their money is not spent to benefit purely private interests. See Laurence Tribe, *American Constitutional Law* § 9-2, at 589 (2d ed. 1988) ("The public's willingness to pay, expressed through the legislative process, would serve as proof that the public had in fact been the beneficiary of what otherwise appeared to be a forbidden transfer of property from one owner or class of owners to another."). In practical terms, public officials who have to answer to the voters are unlikely to spend public funds without public benefits.

No similar restraint exists when the government pays nothing for the taking. See *United States* v. *Gettysburg Elec. Ry.*, 160 U.S. 668, 680 (1896) (when "the full value of the property taken, is to be paid, and the amount must be raised by taxation where the land is taken by the

government itself, there is not much ground to fear any abuse of the [eminent domain] power. . . . It is quite a different view of the question . . . when this power is delegated to a private corporation."). Especially when the private parties who are to receive the taken land provide the compensation, the eminent domain enactment may represent nothing more than a hijacking of the legislative process by private parties for their own benefit.

If it costs a politician nothing to placate and potentially win votes from a powerful, rent-seeking private interest, he or she likely will do so. Apart from the individuals whose property is to be taken and those who are taking it, the public will be indifferent to the legislation and will impose no brake on the process. The decision of who will get the land will turn on nothing more than a calculation of whose political support is more valuable; to the vocal and the organized will go the spoils. See Laura Mansnerus, Note, *Public Use, Private Use, and Judicial Review In Eminent Domain*, 58 N.Y.U. L. Rev. 409, 436-37 (1983) (discussing the "natural legislative tendency to redistribute property in a way that satisfies the maximum number of voters").

If there is any evil the public use requirement of the Takings Clause is designed to prevent, this is it. Where rights of private property are concerned, the Constitution expressly directs that the normal give-and-take of the political process is not an adequate safeguard; the courts must step in to ensure that if landowners are dispossessed, they are dispossessed only for the greater public good. Where the "surrogate assurance of public purpose" provided by public funding no longer exists, more stringent judicial scrutiny of compensated takings is appropriate. Tribe, *American Constitutional Law*, § 9-2, at 590.

c. *Enactment by a unit of local government.* The final factor that may warrant closer judicial scrutiny of a compensated taking is its enactment by a local governmental body, rather than by Congress or a state legislature. Con-

gress and state legislatures are large and diverse bodies at least some of whose constituents will have no direct stake in a localized dispute over land rights. They are broadly democratic and usually bicameral. As a result, their lawmaking processes are characterized by numerous procedural checks and safeguards against excess or impropriety. Such legislatures also have the resources and expertise necessary to engage in serious and meaningful factfinding. For these reasons, national and state legislatures are, at least in relative terms, institutionally competent and resistant to the more extreme forms of rent-seeking by narrow special interests.

Local bodies are another matter. "For reasons of institutional competence and impartiality, and for minimizing potential for abuse, separation of powers arguments supporting a presumption of validity are at their weakest at the local level." Mansnerus, *Public Use*, 58 N.Y.U. L. Rev. at 432. Local legislative and administrative bodies tend to be small and unicameral and, in part for that reason, are far more susceptible to being manipulated by parochial interests. See, *e.g.*, David C. Saffell, *State and Local Government: Politics and Public Policies* 79 (5th ed. 1993) ("Lobbyists representing real estate groups . . . have been more influential at the city level than at the state level"). Local governments are also not restrained by the diversity of interests and issues that compete for attention at the state level. And "local legislative groups often do not have the factfinding capabilities necessary for sophisticated legislative decisions." Mansnerus, *Public Use*, 58 N.Y.U. L. Rev. at 433-34. As far back as the founding of the Republic, American political thinkers have recognized that the risk of abuse of power increases as the size of the political body in question decreases. See, *e.g.*, The Federalist No. 10 (James Madison).

Accordingly, the decisions of local governmental bodies generally do not receive the same degree of judicial deference accorded to Congress or state legislatures. See, *e.g.*, Bruce Ackerman, *Private Property and the Constitution*

210 n.31 (1977) (observing that local land use authorities are not entitled to the same judicial deference accorded "the central legislative processes of the state or nation"); Fred Bosselman, et al., *The Taking Issue* 229 (1973) ("Traditionally, local land use regulations have not been treated by the courts with the same deference shown by the courts to state regulations."). As the Oregon Supreme Court has observed:

> [W]e would be ignoring reality to rigidly view all zoning decisions by local governing bodies as legislative acts to be accorded a full presumption of validity and shielded from less than constitutional scrutiny by the theory of separation of powers. Local and small decision groups are simply not the equivalent in all respects of state and national legislatures.

Fasano v. *Board of Comm'rs*, 507 P.2d 23, 26 (Or. 1973), overruled on other grounds, *Neuberger* v. *City of Portland*, 607 P.2d 722 (1980). This is not to say that local legislative decisions are usually corrupt or irrational, only that the dangers of illegitimate decisionmaking, especially with respect to takings of private property, are at their highest at the local level. Unlike Congress or the state legislatures, therefore, the decisions of local lawmaking bodies should not invariably be entitled to *Midkiff*'s almost irrebuttable presumption of public use, particularly where other danger signals, like those discussed above, are present.

3. The consequences of failing to revisit *Midkiff* to take account of these factors are significant. Failure to modify *Midkiff* will result in nothing less than the systematic underenforcement of an important guarantee contained in the Bill of Rights. Although abuse of the eminent domain power is not widespread, the foregoing discussion—and indeed the facts of this case—demonstrate that there are circumstances where it will occur. If *Midkiff* applies in all circumstances, the federal courts will be powerless to stop such abuses. Deferential, rational basis review is, by design, inadequate to the task of unmasking

pretextual rationales offered by the government for discriminatory or illegitimate activities; the reason for heightened scrutiny is to allow the courts to look behind the stated reasons offered for official actions that carry a higher-than-normal risk of invading constitutional rights. See, *e.g.*, *Shaw* v. *Reno*, 509 U.S. 630, 642-43 (1993); *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520 (1993).

Such underenforcement of the public use requirement, in addition to doing violence to the constitutional text, greatly undermines the security of private property. If a local legislature that wishes to expropriate some valuable real estate for the benefit of a favored constituent can avoid judicial invalidation through the simple expedient of articulating a conceivably rational public purpose, then no property is exempt from the covetous grasp of others. "It does not take much imagination to conceive of the ridiculous 'public uses' which can be 'found' by legislative bodies to accompany purely arbitrary takings." Mark C. Landry, Note, *The Public Use Requirement In Eminent Domain—A Requiem*, 60 Tul. L. Rev. 419, 434 (1985). The only protection for one person who possesses property desired by another person would be raw politics—which is no protection at all. See Richard Posner, *Economic Analysis of Law* § 25.1 at 495-96 (2d ed. 1977) ("The characteristic . . . product of a democratic . . . legislative process is the unprincipled redistribution of wealth in favor of some politically effective interest group."). Under *Midkiff*, the legislative process is fair game for rent-seeking activities by powerful private interests.[8]

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[8] *See* Merrill, *The Economics of Public Use*, 72 Cornell L. Rev. at 86 ("The present rule may produce a kind of secondary rent seeking of its own, as competing interest groups attempt to acquire or defeat a legislative grant of the power of eminent domain. In this way, eminent domain, an instrument designed to overcome rent-seeking behavior associated with thin markets, may inadvertently produce the very type of socially inefficient resource allocation it was designed to avoid.").

The existence of just compensation does not alleviate this concern. Even when compensation is paid, there can be powerful, illegitimate incentives to take land from one private party and give it to another, particularly when the party to whom the land is being transferred pays for it. And, although compensation mitigates the harshness of a taking, it does not mean that a condemnation for private use is not a serious intrusion on individual liberty.[9] "After all, eminent domain entails coerced appropriation of private property by the state, and there is an important difference between coerced and consensual exchange." Merrill, *The Economics of Public Use*, 72 Cornell L. Rev. at 64.

Forcible dispossession destroys a critical aspect of the property right in land for which money is, by definition, an inadequate substitute in the hands of an unwilling seller: the right to possess the land and exclude others from its use.[10] Although the compensation paid may be "just" in the eyes of a jury, it is not "just" in the eyes of the property holder who has been forced to sell against his or her will. For this reason, the common law has long recognized that "monetary relief fails to provide adequate compensation for an interest in real property, which by its very nature is considered unique." *O'Hagan* v. *United*

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[9] *Cf. Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972) ("[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. . . . In fact a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized . . . .")

[10] In addition, under the ordinance at issue in this petition, there is the possibility of a partial taking, in which the lessor is forced into perpetual cotenancy with his former lessees. Pet. App. 118a (§ 2.3). This permanently deprives the former fee owner of operational control over the land; the fee owner can no longer make any decision respecting its use without obtaining the consent of the cotenants. And under Hawaii law, there is no way to break a deadlock if consent is withheld, because the common interests in a condominium are generally not subject to partition. *See* Haw. Rev. Stat. § 514A-13(c) (1993).

States, 86 F.3d 776, 783 (8th Cir. 1996); accord *United Church of the Med. Ctr.* v. *Medical Ctr. Comm'n*, 689 F.2d 693, 701 (7th Cir. 1982) ("It is settled beyond the need for citation . . . that a given piece of property is considered to be unique, and its loss is always an irreparable injury"). In this case, the plight of the small landowners, many of whose families had generations-long ties to the land in question, provides a vivid illustration. Pet. App. 179a-190a.

Nor should the Court shrink from the task of fine-tuning the level of judicial scrutiny applied to eminent domain takings based upon a fear that doing so would revive substantive economic due process. *Cf. Midkiff*, 467 U.S. at 243 n.8. First, it is not appropriate to allow the specter of *Lochner* v. *New York*, 198 U.S. 45 (1905), which enforced unenumerated constitutional rights, to impair the enforcement of rights that *are* enumerated in the Constitution's text. As this Court recently stated, "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation . . . ." *Dolan* v. *City of Tigard*, 512 U.S. 374, 392 (1994). This is no less true of the portion of the Takings Clause that requires public use than it is of the portion that mandates just compensation when the public use requirement has been satisfied.

Second, the risks of a *Lochner* revival are minimal in the eminent domain context. Eminent domain is a policy option that applies only to a small subset of economic problems, and, even with respect to those problems, it is typically only one of many tools available to the government. To allow the courts to ensure that it is used properly, in accordance with the express dictates of the Fifth Amendment, in the limited sphere where it applies, does not pose nearly the same risk of disabling the government's ability to address social or economic problems as judicial interference with substantive economic regulation. Particularly given that a form of heightened scrutiny al-

ready has been held to apply to many types of economic regulation that are alleged to work a taking,[11] there is no reason to refrain from applying heightened review at least to those eminent domain takings where the risks of abuse are particularly high.

"Since almost any taking might rationally be thought to serve a public purpose, the [rational basis] inquiry can determine only that the taking *might* comport with the public use clause . . . ." Mansnerus, *Public Use,* 58 N.Y.U. L. Rev. at 439 (emphasis added). When the nature and circumstances of a taking indicate that the normal safeguards inherent in the eminent domain process do not exist, heightened scrutiny should be employed so that the court can verify that the taking *actually does* serve a public use, as the Fifth Amendment requires. The circumstances identified above define a limited, but important, category of cases where abuse of the eminent domain power is particularly likely and where the rule of near-absolute deference articulated in *Midkiff* provides inadequate protection for Fifth Amendment rights.

II. THIS CASE IS AN EXCELLENT VEHICLE FOR EXAMINING THE OUTER BOUNDS OF *MIDKIFF*'S RULE OF DEFERENTIAL REVIEW.

If the Court wishes to revisit the outer boundaries of its holding in *Midkiff* and consider whether there are any circumstances in which local governments should bear a higher burden of justification for transferring property from one private party to another, this case is an ideal vehicle. It squarely presents each of the circumstances identified above that undermine confidence in the public purpose of a compensated taking.

1. The City's ordinance creates no obvious social surplus. The taking of petitioners' land was designed to accomplish no more than a change in private ownership;

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[11] *See, e.g., Dolan* v. *City of Tigard,* 512 U.S. 374 (1994); *Lucas* v. *South Carolina Coastal Council,* 505 U.S. 1003 (1992); *Nollan* v. *California Coastal Comm'n,* 483 U.S. 825 (1987).

the government did not need the land for its own purposes, and no change in the use of the land by its private owners was contemplated, or even possible. Both before and after the taking, the land was used to support residential condominium structures. Thus, unlike the typical private transferee taking, the condemnation created no social surplus through the dedication of the land to a more productive or efficient use.

Nor did the change in ownership enhance social welfare through the dismantling of an oligopoly and the restoration of competition to the housing market, as in *Midkiff*. In 1987, an official study of potential mandatory lease-to-fee conversion of multi-family housing in Hawai'i concluded that "[t]he data does not support the conclusion that there is an oligopoly of the ownership of land underlying condominium and cooperative projects." Pet. App. 170a. The City Council made no contrary finding, and the Ninth Circuit expressly acknowledged that, "[u]nlike the statute at issue in *Midkiff*, the Ordinance is not grounded on the desire of breaking up a land oligopoly." Pet. App. 13a. Absent the existence of an oligopoly, as Judge O'Scannlain noted below, it is clear that "Ordinance 91-95 has nothing to do with changing the structure of Hawaii's real estate market, and can have no real effect on the price of land." Pet. App. 37a.

2. The taking of petitioners' property also involves no use of public funds. The Department serves merely as an intermediary in what is essentially a private financial transaction. Under the ordinance and its associated rules, the lessees are obliged to pay for the condemned property, plus all of the City's administrative costs, "direct costs," and "allocated costs" related to the transactions. Pet. App. 118a-130a; 142a-158a.[12] Indeed, because the "allocated costs" include such fixed costs as equipment and the salaries of City employees, the ordinance probably constitutes a modest source of revenue for the City.

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[12] *See supra* note 4.

3. Finally, in contrast to the statute in *Midkiff*, the ordinance was passed by a local governmental body. The groups pushing to have the *Midkiff* lease-to-fee conversion regime extended to condominiums had initially sought relief at the state level: between 1986 and 1991, no fewer than 24 separate condominium conversion bills were introduced before the Hawai'i legislature.[13] Yet the state legislature persistently refused to act given that the condominium market was not oligopolistic.

The takings advocates thus turned to the City Council. The City Council is a unicameral, nine-member body, all nine of whose members were reported to have some personal stake in the issue of condominium conversion. Pet. App. 173a. The ordinance ultimately passed by a 5-4 margin. Obviously, any bias or interest on the part of even a single member could have had a decisive impact on the outcome. As it happened, four of the five members who voted in favor of the ordinance were lessees who stood to benefit personally from the takings they authorized.

4. If the Court were to grant certiorari, consideration of the standard-of-review question would not be an abstract exercise, because Ordinance 91-95 could not survive any form of heightened scrutiny.

The Ninth Circuit below explained that the ordinance's redistribution of property from lessors to lessees was justified by the City's finding that the property transfer would "strengthen Oahu's economy and remedy perceived failures in its real estate market." Pet. App. 13a. Under *Midkiff*, the Ninth Circuit was required to defer to this finding, because it obviously was not "impossible" that the City's redistribution of land would strengthen the

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[13] *See* S.B. 1787, S.B. 2436, H.B. 2410, H.B. 2542, and H.B. 2761, 13th Leg., Reg. Sess. (1986); S.B. 470, S.B. 807, S.B. 1724, H.B. 138, H.B. 650, H.B. 1285, and H.B. 1513, 14th Leg., Reg. Sess. (1987); S.B. 2256 and H.B. 2077, 14th Leg., Reg. Sess. (1988); H.B. 217, H.B. 287, H.B. 290, H.B. 675, H.B. 682, and H.B. 1459, 15th Leg., Reg. Sess. (1989); H.B. 688 and H.B. 2168, 15th Leg., Reg. Sess. (1990); S.B. 1255 and H.B. 1982, 16th Leg., Reg. Sess. (1991).

economy—if only by stimulating economic activity by lawyers—or remedy a "perceived failure" in the real estate market. But the suggestion that the ordinance would somehow *actually* reduce inflated land values, upon which a true finding of public use ultimately rests, cannot withstand even the most basic testing.

By definition, if a market is not oligopolistic, no participant or group of participants has any power over price. See IIA Phillip E. Areeda, et al., *Antitrust Law* ¶ 404a-b at 7-10 (1995). As the state study, the district courts, and the Ninth Circuit all acknowledged there was no oligopoly in the market for condominium land on O'ahu. According to the study cited by the Ninth Circuit, the top 20 landowners controlled the land underneath only 34.9% of the total number of condominium units on O'ahu, and approximately 50% of the land was dispersed among 60 different owners. Pet. App. 191a-192a. According to the same study, the land appurtenant to the other half of condominium units was divided among *more than 17,800 different owners.* Pet. App. 192a. The largest landowner, petitioner Kamehameha Schools, was responsible for approximately 15% of the total. No other single landowner controlled more than 2.1%, and the overwhelming majority owned land under just a single building or appurtenant to just a single condominium unit. Pet. App. 191a-192a. This is light years away from any market structure or measure of economic concentration that could conceivably support an inference of oligopoly. See IIA Phillip E. Areeda, et al., *Antitrust Law* ¶¶ 404d at 18, 404e-f (1995).[14]

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[14] In addition, there is now ample evidence that even the redistribution of land approved in *Midkiff* did not work. After *Midkiff* was decided, there was a "speculative bubble" in single-family home prices, as "[t]he fee simple properties proved very attractive to offshore buyers who had access to external capital." Pet. App. 194a-195a. In the five years after *Midkiff*, the prices of single-family homes, now in a perfect market, rose at a significantly faster rate than the prices of condominiums, which according to the City Council, were artificially inflated by undue concentration. *Compare* Department of Bus. & Econ. Dev., *The State of Hawaii Data Book 1987: A Statistical Abstract* 588 (1987) *with* Depart-

Moreover, it was undisputed that there was a large and increasing number of voluntary lease-to-fee conversions occurring in the market. Pet. App. 178a. These voluntary land sales resulted in approximately 50% of units in the O'ahu condominium market owning their fees prior to the enactment of the ordinance. This fact alone reveals that the City Council's finding that the "[o]wnership of land beneath residential condominium apartments . . . is concentrated in the hands of the owners of such land" who have thus far "refused to sell [it]" is nothing more than an irrelevant truism. Pet. App. 105a. Ownership certainly is concentrated in the hands of the owners, and the fact that they are still owners means that they have so far declined to sell, but none of this points toward market failure. The data concerning the O'ahu condominium market would thus preclude judicial acceptance, except under *Midkiff* review, of the suggestion that landowners somehow artificially inflated condominium land values by withholding land from the market.

The high price of land on O'ahu is the result of scarcity, not a distortion of the market. Transferring the fee title in the land from the lessors to the lessees does not eliminate the scarcity, it merely changes the identity of those who benefit from it. The ordinance simply transfers the opportunity to benefit from appreciation in land values on O'ahu from landlords to tenants, without enhancing overall social welfare. Indeed, "the purpose of making proportionate shares of the fee simple title . . . available for acquisition by people who are condominium lessees" is the precise "public use" the ordinance itself cites in support of the taking. Pet. App. 108a. Without the concentration/refusal-to-sell justification that even slightly heightened scrutiny would reveal to be a fraud, the ordinance would thus be exposed for what it is: a naked land grab by a vocal and numerous private interest group.

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ment of Bus. & Econ. Dev., *The State of Hawaii Data Book 1990: A Statistical Abstract* 549 (1990) (66% increase for condominiums versus 98% increase for single-family homes).

III. THIS CASE WARRANTS REVIEW NOTWITHSTANDING THE ABSENCE OF A CONFLICT IN LOWER COURT AUTHORITY, BECAUSE ONLY THIS COURT CAN REFINE ITS OWN PRIOR PRONOUNCEMENTS ON THE PUBLIC USE REQUIREMENT AND HARMONIZE *MIDKIFF* WITH THE STRICTER SCRUTINY MANDATED IN RECENT REGULATORY TAKINGS CASES.

1. In light of *Midkiff*'s broad language, there is no conflict in authority in the lower courts regarding the appropriate standard of review for compensated takings. Nor could there be, as Judge O'Scannlain's reluctant concurrence in the Ninth Circuit's judgment below clearly illustrates. But the absence of a split is no reason not to grant this petition.

As we have argued above, *Midkiff* went too far in relaxing the public use requirement and failed to allow for the possibility that certain circumstances, which are present in this case, might warrant more rigorous judicial review of eminent domain legislation. Numerous academic commentators have agreed, criticizing *Midkiff* for its overbreadth and its near-complete vitiation of the public use requirement of the Takings Clause.[15] Because only this Court is capable of modifying its own prior rulings, if this Court now suspects that it may have spoken too categorically in *Midkiff*, it should grant this petition.

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15 *See, e.g.*, Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 161-69 (1985); David R. E. Aladjem, *Public Use and Treatment as an Equal: An Essay on Poletown Neighborhood Council v. City of Detroit and Hawaii Housing Authority v. Midkiff*, 15 Ecology L.Q. 671 (1988); Thomas W. Merrill, *The Economics of Public Use*, 72 Cornell L. Rev. 61 (1986); Russell A. Brine, Note, *Containing the Effect of Hawaii Housing Authority v. Midkiff on Takings for Private Industry*, 71 Cornell L. Rev. 428 (1985); Thomas J. Coyne, Note, *Hawaii Housing Authority v. Midkiff: A Final Requiem for the Public Use Limitation on Eminent Domain?*, 60 Notre Dame L. Rev. 388 (1985).

2. In addition, the petition should be granted so that *Midkiff*'s rule of virtually absolute deference can be re-evaluated in light of this Court's more recent decisions in the regulatory takings area, which have elevated the level of judicial scrutiny applied to uncompensated takings. Since *Midkiff* was handed down, this Court decided *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992), and *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994), all of which strengthened judicial scrutiny of police power regulations in light of the compensation requirement of the Takings Clause.

In *Nollan*, the Court rejected an argument for rational basis review, holding instead that a land-use regulation must " 'substantially advance[] legitimate state interests.' " See *Nollan*, 483 U.S. at 834 & n.3 (quoting *Agins* v. *Tiburon*, 447 U.S. 255 (1980)). The limitations of the Fifth Amendment were construed to mean that reviewing courts are obliged to determine whether an "essential nexus" exists between a police power regulation that burdens private property rights and the objective harm it seeks to prevent. *Id.* at 837. The Court made clear that, in evaluating whether such a nexus exists, reviewing courts must examine critically legislative findings and explanations, because "[w]e view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination." *Id.* at 841. In *Nollan* itself, the Court invalidated a restriction in a development permit, because the Court concluded that the asserted purpose for that restriction was "made-up," since the restriction did not actually serve it. *Id.* at 839 n.6.

Likewise, in *Lucas*, the Court clarified that any regulation that destroys the value of a person's land constitutes a taking requiring compensation, even if that regulation is a legitimate exercise of the state's police powers that is designed to alleviate a serious harm. See

Lucas, 505 U.S. at 1024-26. The Court emphasized that recitation of a harm-preventing rationale by the legislature could not save such an enactment: "Since such a justification can be formulated in practically every case, this amounts to a test of whether the legislature has a stupid staff. We think the Takings Clause requires courts to do more than insist upon artful harm-preventing characterizations." *Id.* at 1025-26 n.12.

Finally, in *Dolan*, the Court elaborated on *Nollan*'s "essential nexus" test by clarifying the "required degree of connection" between conditions imposed on a development permit and the harms sought to be remedied by those conditions. *Dolan*, 512 U.S. at 386. The Court expressly rejected the "minimal level of scrutiny" associated with rationality review, holding instead that the government has the burden to demonstrate, and reviewing courts have a burden to find, that a "rough proportionality" exists between the burdens imposed by the regulation and the police power purposes supporting it—that is, the government must prove that its restrictions on land use are "related both in nature and extent to the impact of the proposed development." *Id.* at 391. Even though the City in *Dolan* had articulated reasonable police power goals and, unlike *Nollan*, had demonstrated that there was a rational nexus between those goals and the burdens it sought to impose on the landowner, the Court closely scrutinized the City's factual findings and the evidence on which they were based and held that the City had failed to demonstrate a sufficiently close means-ends fit. See *id.* at 392-96. The Court expressly disallowed reliance on "conclusory statement[s]" of legislative findings and required instead "some effort" on the part of the City "to quantify its findings in support of" the regulation in question. *Id.* at 395-96.

As Judge O'Scannlain explained below, "[t]he *Nollan-Lucas-Dolan* trio . . . establishes that the Takings Clause is a limitation upon the state's police powers." Pet. App. 34a. If the just compensation requirement of that Clause

can sometimes force the state to justify why it should be allowed to restrict the use of private property without paying for it, surely the public use requirement can sometimes force a local government to justify why it should be allowed to resort to an outright seizure of such property. As Judge O'Scannlain observed:

> Although *Midkiff* has not been overruled, and although *Nollan, Lucas,* and *Dolan* deal with a different part of the Takings Clause, I nevertheless believe that there is tension between these two lines of authority. The underlying thrust of the *Nollan-Lucas-Dolan* decisions—increasing the scrutiny of regulations to determine if they go 'too far' (enough to require compensation)—is inconsistent with *Midkiff*'s sweeping deference. It may be time for the Supreme Court to reconsider *Midkiff*.

Pet. App. 33a-34a.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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June 3, 1998

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 94-16041, 94-16142,
94-16143 and 94-16327

WILLIAM S. RICHARDSON; HENRY H. PETERS, JR.; OSWALD K. STENDER, MYRON B. THOMPSON, and MATSUO TAKABUKI, in their capacities as Trustees of the KAMEHAMEHA SCHOOLS/BERNICE PAUAHI BISHOP ESTATE,
Plaintiffs-Appellants,

v.

CITY AND COUNTY OF HONOLULU,
a Hawaii Municipal Corporation,
Defendant-Appellee,

and

HALE COALITION,
Intervenor.

WILLIAM S. RICHARDSON; HENRY H. PETERS, JR.; OSWALD K. STENDER, MYRON B. THOMPSON, and MATSUO TAKABUKI, in their capacities as Trustees of the KAMEHAMEHA SCHOOLS/BERNICE PAUAHI BISHOP ESTATE,
Plaintiffs-Appellees,

and

HALE COALITION,
Intervenor,

CITY AND COUNTY OF HONOLULU,
a Hawaii Municipal Corporation,
Defendant-Appellant.

WILLIAM S. RICHARDSON; HENRY H. PETERS, JR.; OSWALD K. STENDER, MYRON B. THOMPSON, and MATSUO TAKABUKI, in their capacities as Trustees of the KAMEHAMEHA SCHOOLS/BERNICE PAUAHI BISHOP ESTATE,
Plaintiffs-Appellees,

v.

HAWAII LEASEHOLDERS EQUITY COALITION,
Intervenor-Appellant,

and

CITY AND COUNTY OF HONOLULU,
a Hawaii Municipal Corporation,
Defendant.

SMALL LANDOWNERS OF OAHU,
Plaintiff-Appellant,

v.

CITY AND COUNTY OF HONOLULU,
Defendant-Appellee.

Argued and Submitted Nov. 2, 1995
Decided Sept. 8, 1997

Appeals from the United States District Court for the District of Hawaii; David A. Ezra, District Judge, Presiding. D.C. No. CV-91-00725-DAE.

Appeal from the United States District Court for the District of Hawaii; Harold M. Fong, District Judge, Presiding. D.C. No. CV-92-00372-HMF.

Before: HUG, Chief Judge, THOMPSON and O'SCANNLAIN, Circuit Judges.

HUG, Chief Judge:

OPINION

In these consolidated cases we are asked to determine the constitutionality of two land reform ordinances passed by the City Council for the City and County of Honolulu (the "City"). Ordinance 91-95 provides a mechanism for converting leasehold interests in condominium units to fee interests, through the use of the City's condemnation power. Ordinance 91-96 is a rent control measure that limits increases in ground rent due the owner of the land under the condominium units. The trustees of the Bishop Estate ("Bishop Estate") brought an action before District Judge Ezra contesting the constitutionality of both ordinances. The Small Landowners of Oahu ("Small Landowners") brought a separate action before District Judge Fong. Judges Ezra and Fong each entered summary judgments upholding Ordinance 91-95. Judge Ezra also entered a summary judgment holding Ordinance 91-96 (the rent control ordinance) unconstitutional. We have jurisdiction under 28 U.S.C. § 1291 and we affirm.

I. BACKGROUND

Prior to American acquisition, Hawaii developed an extensive feudal land ownership system that has proved

remarkably resistant to change. Although Hawaiian leaders and American settlers have repeatedly attempted to divide the large Hawaiian land estates, the results have generally been unsuccessful. As of the late 1980's, the largest eighteen landowners in the state owned 40% of the available land. L.A. Powe, Jr., *Economic Make-Believe in the Supreme Court,* 3 Const. Comm. 385, 389 (1986). The seventy-two largest landowners owned 47%. *Id.* With the federal and state government owning 49% of the land in the state, *id.*, little is left for the rest of the population. As might be expected in an area of desirable real estate with little land for sale, the price of owning land in Hawaii has grown exponentially over the past several decades.

The large private landowners have adopted a pattern of leasing their land for long terms rather than selling it. Often the land is leased to a developer who builds condominiums [1] on the property. The condominiums are then sold subject to the ground lease. Sometimes the landowners themselves build and sell the condominiums, subject to a ground lease. The leases, commonly for 55 years or longer, require a substantial initial payment and lease payments for 25 to 30 years at a fixed rate. At the end of the initial term, the rent is renegotiated pursuant to the terms of the lease. The new rent usually is based on the market value of the unimproved land as described in the lease. Stated another way, the renegotiated rent is fixed at a percentage of the market value of the parcel underneath the condominium exclusive of improvements (*i.e.*,

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[1] For purposes of this opinion, unless otherwise noted, references to "condominiums" or "condominium properties" include condominium property regime developments, cooperative housing corporation developments, and planned unit developments, which are the three types of developments addressed by Ordinances 91-95 and 91-96.

the condominium).[2] In almost all cases, the renegotiated rent substantially exceeds the initial fixed rate.

To break up this pattern of land ownership and control the escalating prices of housing, the City passed Ordinances 91-95 and 91-96 on December 18, 1991.

That day the appellants in *Richardson* filed suit in federal court before Judge Ezra seeking declaratory and injunctive relief. The *Richardson* appellants are trustees of the Bishop Estate, a charitable trust established in 1884 under the will of Ke Ali'i Bernice Pauahi Bishop, the great-granddaughter of King Kamehameha I, to erect and maintain schools for indigents and orphans who are native Hawaiians. The Bishop Estate owns the fee simple title to the land underneath condominiums in Honolulu that are affected by the Ordinances.[3] A group of condominium owners calling themselves the Hawaii Leaseholders Equity Coalition (the "HALE coalition") was granted permission to intervene in the action as an interested party.

On February 14, 1992, the Bishop Estate filed a partial motion for summary judgment. On June 8, 1992, the

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[2] An example provided by the landowners in their brief is illustrative. The lessees of one apartment purchased their unit in January of 1988 for $986,500, and assumed the existing ground lease. They currently pay $45 per month in ground lease rent and will continue to do so until the 30-year fixed rent period expires in 1997. At that time, the lease fixes the new rent at six percent of the fair market value of the land exclusive of improvements. If the period had ended in 1991, the parties to the lease might have used the real property tax assessed value used by the City as the fair market value of the land exclusive of improvements. In 1991 the real property tax assessed value used by the City for the land appurtenant to the unit was $213,300. The new ground lease rent would be 6% of that figure, which is $12,798 per year, or $1,066 per month.

[3] The City contends that the Bishop Estate owns approximately 20% of the condominiums on Oahu. The Bishop Estate does not refute this number.

HALE Coalition also moved for partial summary judgment. On June 9, 1992, the City filed a cross-motion for summary judgment on all counts.

Meanwhile, on June 12, 1992, the Small Landowners, a nonprofit membership corporation representing landowners who own smaller plots of land underneath condominium projects, filed a separate complaint in federal court before Judge Fong seeking a declaration that Ordinances 91-95 and 91-96 were constitutionally invalid. The Small Landowners moved to consolidate their action with (or alternatively, to intervene in) the action instituted by the Bishop Estate. The motion was denied and the Small Landowners' suit proceeded separately.

On September 16, 1992, Judge Ezra (1) declared Ordinance 91-96 unconstitutional on its face under the Takings Clause; (2) held that Ordinance 91-95 was facially constitutional under the Public Use, Just Compensation, Due Process, and Equal Protection Clauses of the federal and Hawaii constitutions; and (3) certified to the Hawaii Supreme Court the question whether Ordinance 91-95 was preempted by state law. *See Richardson v. City & County of Honolulu*, 802 F.Supp. 326 (D.Haw.1992).

The Small Landowners and the City subsequently stipulated to dismiss the Small Landowners' claim regarding Ordinance 91-96. The parties also agreed to dismiss the Small Landowners' claims regarding state law preemption, because those questions would be decided by the Hawaii Supreme court in the *Richardson* case. On September 16, 1993, Judge Fong issued his order holding that Ordinance 91-95 was facially constitutional under the Takings, Due Process, and Equal Protection Clauses of the federal and Hawaii constitutions, and that the Small Landowners' claims that Ordinance 91-95 failed to provide just compensation or comply with the City's Charter were unripe. *See Small Landowners of Oahu v. City & County of Honolulu,* 832 F.Supp. 1404 (D.Haw.1933).

On February 22, 1994, the Hawaii Supreme Court answered the certified question from *Richardson* in the negative, *Richardson v. City & County of Honolulu*, 76 Hawai'i 46, 868 P.2d 1193 (1994), and on April 12, 1994, Judge Ezra adopted the Hawaii Supreme Court's answer. On April 18, 1994, Judge Ezra entered final judgment. Judge Fong entered final judgment in *Small Landowners* on June 20, 1994. All parties filed timely notices of appeal. Because of the similar issues presented, the two actions were consolidated before this court after oral argument.

II. ORDINANCE 91-95

A. *The Statute*

Ordinance 91-95, which closely parallels Hawaii's Land Reform Act of 1967, creates a mechanism through which condominium owners can convert their leasehold interests into fee simple interests. When at least 25 owners in a condominium complex or the owners of 50% of the units, whichever is less, apply to purchase their leased fee interest, the Ordinance's condemnation procedure is triggered. The Department of Housing and Community Development (the "Department") then determines if the property is proper for condemnation. The Department will begin condemnation proceedings within twelve months unless the owner agrees to voluntarily sell the leased fee interest to the lessees. If the Department condemns the land, the lessee must purchase the land from the City within 60 days.

In conjunction with enacting the Ordinance, the City made several findings regarding the concentration of land in Honolulu and the effects of such concentration on the local economy. First, the City found that landowners have refused to sell proportionate shares in their fee simple titles and that the few sales that occurred involved exorbitant prices. Honolulu City & County, Haw. Ordinance 91-95, § 1(a). This refusal to sell fee simple titles, along

with other factors, has caused a dramatic increase in the price of housing in Honolulu. *Id.* The City further found that persons wishing to reside on Oahu were forced to sign long-term leases that provide for periodic rent renegotiation. *Id.* These conditions have led to

> the acute recent inflation of land costs [that] has adversely affected lease rent negotiations of persons who have purchased leasehold multi-family units as their homes: in some instances renegotiations have resulted in lease rents that have increased over 1,000 percent. Under the burden of increased lease rents, many owner-occupants of residential condominium apartments . . ., especially those on fixed incomes, have found, and will continue to find themselves unable to afford to continue living in their homes.

Id. Moreover, the City determined that these defects in the housing market would adversely affect the City's economy:

> There is a close relationship between the monetary values accorded land on Oahu and the stability and strength of Oahu's economy as a whole. Residential condominium . . . land values, artificially inflated by concentrated or single ownership, market conditions or other factors, skew Oahu's economy toward unnecessarily high levels. The pervasive and substantial contribution made to inflation by high residential condominium . . . land values creates a potential for economic instability and disruption on Oahu. Economic inflation, instability and disruptions on Oahu have real and potential damaging consequences for all members of an affected society.

Id. The City thus decided to exercise its power of eminent domain to establish a proper real estate market in Honolulu and to reduce the potential for economic instability on Oahu.

B. *The Public Use Clause*

The Bishop Estate and the Small Landowners (collectively the "landowners") argue that Ordinance 91-95 violates the Public Use Clause of the United States and Hawaii constitutions. The Fifth Amendment of the United States Constitution provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. This provision applies to the states through the Fourteenth Amendment. *See Missouri Pac. Ry. v. Nebraska,* 164 U.S. 403, 417, 17 S.Ct. 130, 135, 41 L.Ed. 489 (1896). Municipalities possessing delegated eminent domain power also are subject to the restrictions of the Fifth and Fourteenth Amendments. *See Chicago B. & Q. R.R. Co. v. City of Chicago,* 166 U.S. 226, 238-39, 17 S.Ct. 581, 585-86, 41 L.Ed. 979 (1896). Similarly, the Hawaii Constitution provides that "[p]rivate property shall not be taken or damaged for public use without just compensation." Haw. Const. art. I., § 20.

The landowners argue that Ordinance 91-95 is unconstitutional because it takes land for the benefit of private persons and, alternatively, that its public purpose is not served by its mechanism. As noted above, the Ordinance is similar to Hawaii's Land Reform Act of 1967 [4] (the "Act"), which was upheld on public use grounds in *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984). Because of the Ordinance's similarity to the Act, we begin our analysis with *Midkiff.*

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[4] The Act was designed to compel large landowners to break up their estates. Under the Act, tenants who lease and live on single-family residential lots within developmental tracts at least five acres in size can ask the Hawaii Housing authority ("HHA") to condemn the property on which they live. When half of the tenants in the tract, or 215 tenants, whichever is less, file an application, the HHA can acquire some or all of the lots in the Act by condemnation. The HHA then can sell the lots to the tenants.

In that case, the Supreme Court upheld the Act, concluding that Hawaii could constitutionally use its power of eminent domain to break up a land oligopoly. *Id.* at 241-42, 104 S.Ct. at 2329-30. The Supreme Court rejected the landowners' arguments that the Act violated the public use requirement of the Takings Clause.[5] The Court stated, "The 'public use' requirement thus is coterminous with the scope of a sovereign's police powers." *Id.* at 240, 104 S.Ct. at 2329.

Thus, as the Court noted, the judiciary's role in reviewing the legislature's judgment regarding public use is extremely narrow. *Id.* The judiciary should defer to the legislature's public use determination unless the use involves an "impossibility" or is "palpably without reasonable foundation." *Id.* at 240-241, 104 S.Ct. at 2329-30. The Court further noted that "where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause." *Id.* at 241, 104 S.Ct. at 2329-30.

Applying that test, the Court noted that the state legislature determined a land oligopoly existed in Hawaii. The Court reasoned that regulating the "oligopoly and the evils associated with it is a classic exercise of a State's police powers." *Id.* at 242, 104 S.Ct. at 2330. Even though the Act's result was to turn land over from one private owner to another, the Court held that the statute's purpose was sufficiently public. *See id.* at 241, 104 S.Ct. at 2329. Finally, the Court noted that using a lease-to-fee transfer statute to regulate that oligopoly was not irrational. *Id.* Accordingly, the Court upheld the Act.

The analysis under the Hawaii Constitution is similarly deferential to the legislature's public use determination.

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[5] The landowners in *Midkiff* were trustees of the Bishop Estate, the appellants in the *Richardson* action.

> [O]nce the legislature has spoken on the social issue involved, so long as the exercise of the eminent domain power is rationally related to the objective sought, the legislative public use declaration should be upheld unless it is palpably without reasonable foundation. The crucial inquiry is whether the legislature might reasonably consider the use public, and whether it rationally could have believed that application of the sovereign's condemnation powers would accomplish the public use goal.

Hawaii Housing Authority v. Lyman, 68 Haw. 55, 704 P.2d 888, 897 (1985) (internal citation omitted).

In the present action, both district courts determined that *Midkiff* controlled the outcome of this dispute. Because the statute in *Midkiff* and Ordinance 91-95 are so similar, both courts found no merit in the Landowner's public use arguments. Before this court, the landowners seek to distinguish *Midkiff* on several grounds: (1) that the standard of review has changed since *Midkiff*; (2) that the public purpose of the Ordinance is not as compelling as the purpose asserted in *Midkiff*; and (3) that the means of effectuating the purpose is irrational in light of developments since *Midkiff*. We discuss each of these arguments.

1. *Change in the standard of review*

The landowners argue that, in light of *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994), *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992) and *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), the deference given in *Midkiff* to the legislative body's public use findings is inappropriate. The landowners assert that those cases require heightened scrutiny. We conclude that those cases are not applicable because they involved uncompensated regulatory takings, in which the issues are quite different.

In a regulatory taking case, the court must determine whether a putative regulatory action masks a taking. For example, in *Dolan*, the most recent case, a shop owner in Oregon brought suit against the City of Tigard. She had applied for a permit needed to expand her store and pave a parking area. *Dolan*, 512 U.S. at 379, 114 S.Ct. at 2313-14. The city's planning commission granted the permit application, but only on the condition that the shop owner dedicate to the city part of her property that was within a floodplain plus a 15 foot strip of land for use as a pedestrian pathway. *Id.* at 379-80, 114 S.Ct. at 2313-14. The shop owner filed suit alleging that the condition was an unconstitutional regulatory taking.

Dolan, as well as *Lucas* and *Nollan*, are quite different from the cases before us. At bottom, those cases involve balancing the authority of state and local governments to engage in land use planning against the property rights of individuals. *See Dolan*, 512 U.S. at 383-86, 114 S.Ct. at 2315-17. The primary issue is whether the landowner is to receive just compensation. *See e.g., id.* at 385, 114 S.Ct. at 2317 ("Under the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the property sought has little or no relationship to the benefit."). That is, if the Court would have upheld the putative regulatory actions in those cases, the landowners' property would have been subject to the challenged land restriction and the owner would not have been entitled to compensation for the diminution in land value. The heightened scrutiny applied in *Dolan* thus is necessary to prevent the government from using its regulatory power to force individuals to bear burdens that properly should be born by the public. *See id.*, at 389, 114 S.Ct. at 2319 ("We think this standard is too lax to adequately protect petitioner's right to just

compensation if her property is taken for a public purpose.").

Conversely, in the cases before us, the government has expressly exercised its condemnation power and will compensate the landowners. Here, as in *Midkiff*, the requirement of just compensation ensures that individuals will not be forced to bear public burdens, which in all fairness should be borne by the public as a whole. Heightened scrutiny thus is inappropriate. The language used throughout *Midkiff* indicates that deference to the legislative body's public use determination is required when the taking is fully compensated. *See e.g., Midkiff*, 467 U.S. at 241, 104 S.Ct. at 2329-30 ("[W]here the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause."). For these reasons, we believe that *Nollan-Lucas-Dolan* trio does not signal a change from this long standing rule of deference because we see nothing inconsistent in applying heightened scrutiny when the taking is uncompensated, and a more deferential standard when the taking is fully compensated.

We hold, therefore, that the standard of review to be used in examining Ordinance 91-95 is the minimum scrutiny test espoused in *Midkiff*. We will defer to the City's determination regarding public use unless the use involves an "impossibility" or is "palpably without reasonable foundation." *Midkiff*, 467 U.S. at 240-41, 104 S.Ct. at 2329.

2. *The rationality of the public purpose*

Unlike the statute at issue in *Midkiff*, the Ordinance is not grounded on the desire of breaking up a land oligopoly. Rather, the City enacted the Ordinance to strengthen Oahu's economy and remedy perceived failures in its real estate market. The City found:

> There is a close relationship between the monetary values accorded land on Oahu and the stability and strength of Oahu's economy as a whole. Residential condominium, cooperative housing and planned development land values, artificially inflated by concentrated or single ownership, market conditions or other factors, skew Oahu's economy toward unnecessarily high levels. The pervasive and substantial contribution made to inflation by high residential condominium, cooperative housing and planned development land values creates a potential for economic instability and disruption on Oahu. Economic inflation, instability and disruptions on Oahu have real and potential damaging consequences for all members of an affected society. Checking inflation, improving the stability of the economy, and avoiding disadvantageous economic disruptions all are productive of general benefit to all members of Oahu's community.

Honolulu City & County, Haw. Ordinance 91-95 § 1(a).

This purpose—remedying a failure in the real estate market and strengthening the economy—is a public purpose. *See Midkiff*, 467 U.S. at 242, 104 S.Ct. at 2330 (land oligopoly caused failure in real estate market; regulating evils associated with oligopoly is classic exercise of police power); *Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954) (affirming the constitutionality of the District of Columbia Redevelopment Act of 1945, which provided for the condemnation of slum areas for possible sale to private interests). The landowners contend, however, that the evidence presented to the City does not support the stated public purpose. They assert that, contrary to the City's findings, ownership of condominium units is not concentrated in the hands of large landowners and that landowners do sell proportionated shares of their fee simple titles. Thus, they argue that because the City incorrectly determined these facts, the

findings do not support the Ordinance's stated public purpose.

Under the standard espoused in *Midkiff*, we must accept the public purpose of the Ordinance unless the City's findings are "palpably without reasonable foundation." *Midkiff*, 467 U.S. at 241, 104 S.Ct. at 2329. The City held three days of public hearings before enacting the Ordinance. The City determined that the price of condominiums was higher because the ownership of the fee-simple titles to the land underneath the condominiums was excessively concentrated. While the hearings produced conflicting testimony, one study presented to the City showed that the largest 20 Landowners own 34.9% of the land under condominium units in Honolulu, and that the largest 60 own 50.4%. Legislative Reference Bureau, Report No. 6, *Ownership Patterns of Land Beneath Hawaii's Condominiums and Cooperative Housing Projects* 21 (1987) (*Ownership Patterns*). While the largest 20 landowners own a smaller percentage of land underneath condominiums than the largest 22 owned of the fee simple titles when the Court decided *Midkiff*, *see Midkiff*, 467 U.S. at 232, 104 S.Ct. at 2325, the concentration of ownership of land underneath condominiums is greater than the concentration of land ownership throughout the state at the time *Midkiff* was decided. *Compare Ownership Patterns* at 21 (60 persons own 50.4% of land under condominiums), *with Midkiff*, 467 U.S. at 232, 104 S.Ct. at 2325 (72 persons own 47% of land in Hawaii). We thus cannot say that the City's finding is without reasonable foundation.

Similarly, the evidence presented to the City regarding the amount of fee simple lands for sale underneath condominiums was conflicting. We are not free to substitute our judgment for that of the City. The evidence reviewed by the City adequately demonstrated that the land underneath the condominiums was not being sold and that the

lack of such sales was driving up the price of housing in Honolulu. We therefore must accept the City's asserted public purpose because its findings are not without reasonable foundation. *See Midkiff*, 467 U.S. at 241, 104 S.Ct. at 2329 ("In short, the Court has made clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.' ") (citation omitted).

3. *The reasonableness of the means used*

The landowners also argue that, between 1987 and 1990, the price of condominiums in Hawaii increased by 66%. However, the price of single-family dwellings—which were subject to the Act's lease-to-fee provision—increased by 98%. Dep't of Business and Economic Dev., *The State of Hawaii Databook 1990: A Statistical Abtract* 549 (1990). Thus, the landowners argue that even if a lease-to-fee statute was reasonably related to eliminating a land oligopoly at the time of *Midkiff*, such means are not rationally related to remedying a failure in the real estate market and strengthening the economy in light of recent history.

Deference to the legislative body's public use determination is required " 'until it is shown to involve an impossibility.' " *Midkiff*, 467 U.S. at 240, 104 S.Ct. at 2329 (quoting *Old Dominion Co. v. United States*, 269 U.S. 55, 66, 46 S.Ct. 39, 40-41, 70 L.Ed. 162 (1925)). "Any departure from this judicial restraint would result in courts deciding on what is and is not a governmental function and in their invalidating legislation on the basis of their view on that question at the moment of decision, a practice which has proved impracticable in other fields." *United States ex rel. T.V.A. v. Welch*, 327 U.S. 546, 552, 66 S.Ct. 715, 718, 90 L.Ed. 843 (1946). Additionally, in *Midkiff* the Court noted that whether the statute actually succeeds is irrelevant.

> But "whether *in fact* the provision will accomplish its objectives is not the question: the [constitutional requirement] is satisfied if . . . the . . . [state] Legislature *rationally could have believed* that the [Act] would promote its objective." When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings . . . are not to be carried out in the federal courts.

Midkiff, 467 U.S. at 242-43, 104 S.Ct. at 2330 (brackets in original) (quoting *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 671-72, 101 S.Ct. 2070, 2084-85, 68 L.Ed.2d 514 (1981)) (internal citations omitted).

Under the rational basis test, we hold that the Ordinance is constitutional under both the United States and Hawaii constitutions. Regardless of what has occurred with single-family dwellings, the City rationally could have believed that, if the supply of condominiums increased (through the lease-to-fee measure of Ordinance 91-95), the price of those condominiums would decrease. Additionally, although the price of single-family houses increased dramatically between 1987 and 1990, there is no indication that the price would not have gone up even more without the Act's lease-to-fee mechanism. Finally, even if the price of condominiums does not decrease as a result of the Ordinance, some of the public purposes of the Ordinance will be served. If a family is allowed to purchase its condominium, that family will not risk being thrown out of its home in 25 years because the family cannot afford the renegotiated rent. The City rationally could have concluded that the lease-to-fee mechanism would remedy defects in the housing market and stabilize Oahu's economy.

C. *The Just Compensation Clause*

When a government uses its powers of eminent domain to condemn property, it must provide the property owner with "just compensation." U.S. Const. amend V.; *accord* Haw. Const. art. I, § 20. Just compensation is the "full monetary equivalent of the property taken." *United States v. Reynolds*, 397 U.S. 14, 16, 90 S.Ct. 803, 805, 25 L.Ed.2d 12 (1970).

The landowners argue that Ordinance 91-95 does not fully compensate them for the taking of their property. In particular, they argue that the Ordinance fails to provide compensation for their loss of rental income or for the diminution in the value of their remaining fee simple interest in any land that is involuntarily converted from their sole ownership to a cotenancy under the ordinance.[6] Both district courts dismissed these claims as unripe. *Richardson*, 802 F.Supp. at 341; *Small Landowners*, 832 F.Supp. at 1411.

Ripeness is a question of law reviewed *de novo*. *Carson Harbor Village Ltd. v. City of Carson*, 37 F.3d 468, 474 (9th Cir.1994). "If a claim is unripe, federal courts lack subject matter jurisdiction and the complaint must be dismissed." *Southern Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 502 (9th Cir.1990). Whether a claim is ripe generally turns on the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. *Pacific Gas & Elec. Co. v. State Energy Resources Conserv. & Devel. Comm'n*, 461 U.S. 190, 201, 103 S.Ct. 1713, 1720, 75 L.Ed.2d 752 (1983). The "central concern [of the ripeness inquiry] is

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[6] Under the Ordinance, the Department has the option of condemning only a portion of the fee simple title under a condominium project (such as where some of the condominium lessors do not wish to purchase the fee simple title). In such a situation, the original land owner will share the fee simple title to the land with each condominium purchaser as a cotenant.

whether the case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all." 13A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3532 at 112 (2d ed. 1984).

Here, the Bishop Estate came to federal court the same day the City enacted the Ordinance. The condemnation procedure at issue is not self-executing. Rather, several events must occur before any taking will occur. First, at least 25 condominium owners or the owners of 50% of the units, whichever is less, must file an application with the Department to trigger the Ordinance's procedures. Then, after "[d]ue notice is given and a public hearing held," the Department must determine whether the "exercise of the power of eminent domain" requested by the applicants "will effectuate the public purposes of [the Ordinance]." Honolulu City & County, Haw. Ordinance 91-95 § 2.2(a)(2). The Ordinance also requires that, before the Department exercises its power of eminent domain, that the lessor and lessees negotiate "the just compensation which" will be paid. Honolulu City & County, Haw. Ordinance 91-95 § 4.6. Only then will the Department set forth to condemn property.

At this juncture, no group of tenants has asked the Department to invoke the condemnation procedures created by the Ordinance. It is possible that any one of the conditions precedent to the exercise of the Department's eminent domain power might not occur. A sufficient number of qualifying tenants, *see* Honolulu City & County, Haw. Ordinance § 4.4 (setting forth seven requirements that lessee must meet before a sale takes place), might not file an application with the Department. The Department might conclude in any given case that exercising its power of eminent domain would not further the public purpose of the Ordinance. In any event, the required preliminary

negotiations could result in an agreement as to the appropriate compensation. Because any one of these contingent events might not occur, we conclude that the landowners' claim under the Just Compensation clause is not ripe for federal adjudication.

The Supreme Court's clear guidance regarding application of the ripeness doctrine to takings claims reinforces our conclusion that the landowners' claim is not ripe. The Court has "placed two hurdles in the way of a takings claim brought in federal court against states and their political subdivisions." *Levald, Inc., v. City of Palm Desert*, 998 F.2d 680, 686 (9th Cir.1993) (internal quotation omitted). It is the second of these two hurdles, which requires that plaintiffs "seek compensation through the procedures the State has provided for doing so before turning to the federal courts," *id.* (internal quotation omitted), that has not been met here. Because no property has been targeted for taking, the landowners have not sought and been denied condemnation by the Department. Moreover, the landowners have not invoked the processes provided by Hawaii's courts for obtaining just compensation.

The landowners argue and the dissent concludes, however, that their claims are ripe because the Ordinance's plain language fails to provide for full compensation. Requiring the landowners to seek compensation through Hawaii's procedures, they argue, would be futile under existing state law. *See id.* at 686. The landowners burden of showing that complying with the state's procedures would be futile is a heavy one. *American Savings & Loan Ass'n v. County of Marin*, 653 F.2d 364, 371 (9th Cir. 1981). We conclude that the landowners have not carried their burden.

The Ordinance provides that "[t]he compensation to be paid . . . shall be the current fair market value of the leased fee interest." Honolulu City & County, Haw. Ordinance § 1.2. It defines "leased fee interest" as the "re-

versionary interests of the fee owner . . . other than the lessee's or sublessee's interest." *Id.* The dissent argues that the plain meaning of the Ordinance deprives the landowners of compensation for the lost stream of rental payments and, therefore, "unless the Ordinance means something other than what it very clearly says, it does not authorize the Department to give landowners just compensation." *Dissenting Opinion* at 1170. We disagree.

The Ordinance speaks of "reversionary interests" as being in the plural. This points to a recognition of multiple factors to be included in the valuation. The Fifth Circuit has stated that a "reversionary interest is *any* future interest left in a transferor or his successor in interest." *United States v. 50.822 Acres of Land, More or Less,* 950 F.2d 1165, 1169 n. 4 (5th Cir.1992) (internal quotation omitted) (emphasis added). The Department could well interpret the "reversionary interests" of the fee owner as his entire interest in the land under the condominiums as of the date the eminent domain action is commenced.

Basic principles of property law, in fact, practically compel that interpretation. The reversionary interest of a lessor, as the dissent notes, is "[t]he property that reverts to the grantor after the expiration of an intervening income interest." *Blacks Law Dictionary* 1186 (5th ed. 1979). In other words, a reversionary interest is "[a] right to the future enjoyment of property, at present in possession or occupation of another." *Id.* The Ordinance thus directs the Department to pay the fair market value of the property which reverts to the lessor at the expiration of the lease. What reverts to the lessor is a fee interest in the ground underneath the condominium. The projected earning of that property would be a normal factor in determining the value of the property that reverts to the lessor. *See* Ordinance 91-95 at § 1.2 (defining fair market value as the price to which a willing buyer and seller taking into consideration "all uses to which the land is adapted or might in reason be applied").

We hold that the landowners' challenge is not ripe. There are obviously many different ways the Department could approach the valuation of the lessors' reversionary interest. The Department has not issued regulations regarding the compensation of the landowners and there is no basis for determining that the landowners will not be fully compensated for their interests. It is apparent that the "plain meaning" of the Ordinance does not foreclose the payment of constitutionally adequate compensation for the landowners' "reversionary interests." Moreover, the City's intent to pay the current fair market value of the leased fee interest is clear. The Ordinance anticipates a complete valuation of the lessors' property interests. It is only if the definition of "leased fee interest" is given a restricted meaning that the landowners would not receive constitutionally adequate compensation. Until that happens, federal adjudication of the landowners' just compensation claim is premature.

D. *The Due Process Clause*

The Due Process Clause of the Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV; *accord* Haw. Const. art I, § 5. The Due Process clause confers both procedural and substantive rights. *United States v. Salerno*, 481 U.S. 739, 746, 107 S.Ct. 2095, 2101, 95 L.Ed.2d 697 (1987); *Armendariz v. Penman*, 75 F.3d 1311, 1318 (9th Cir.1996) (en banc). A municipal act that neither utilizes a suspect classification nor draws distinctions among individuals that implicate fundamental rights will violate substantive due process rights when it is shown that the action is not "rationally related to a legitimate governmental purpose." *Munoz v. Sullivan*, 930 F.2d 1400, 1404 (9th Cir. 1991). We will strike down a statute on substantive due process grounds if it is arbitrary and irrational. *Del Monte Dunes v. City of Monterey*, 920 F.2d 1496, 1508 (9th Cir. 1990).

The landowners again argue that the Ordinance is arbitrary and irrational because it has no legitimate public purpose, because lease-to-fee statutes have been proved not to work, and because the Ordinance is not rationally related to achieving a valid objective.

The challengers' burden to show that a statute is arbitrary and irrational is extremely high. *See Del Monte Dunes*, 920 F.2d at 1508. "In a substantive due process challenge, we do not require that the City's legislative acts actually advance is stated purposes, but instead look to whether 'the govenmental body *could* have had no legitimate reason for its decision.' " *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1234 (9th Cir.1994) (quoting *Levald, Inc.*, 998 F.2d at 690). As explained above, *see supra* section II(B)(2), the City has expressed a valid public purpose in attempting to control condominium price inflation. Furthermore, the City's decision to utilize a lease-to-fee ordinance to effectuate this purpose is not irrational. *See supra* section II(B)(3). Accordingly, we hold that the landowners cannot meet the burden of showing irrationality.

E. *The Equal Protection Clause*

The United States Constitution guarantees that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. const. amend XIV; *accord* Haw. Const. art. I, § 5. The Bishop Estate and the Small Landowners assert that Ordinance 91-95 violates the Equal Protection Clause in two ways. First, the Bishop Estate alleges that ordinance 91-95 was enacted to favor non-Hawaiian lessees over Native Hawaiians and Native Hawaiian Trusts in violation of their equal protection rights. The Small Landowners additionally allege that the Ordinance violates their equal protection rights by "irrationally grouping together all condominium landowners without any factual or legal basis for inclusion of small landowners."

1. *Native Hawaiians' equal protection claims*

The Ordinance applies to condominiums regardless of whether the owner is Native Hawaiian or non-Hawaiian. It thus does not on its face draw a distinction on the basis of a suspect classification. Nonetheless, the landowners assert that the Ordinance is unconstitutional due to its discriminatory effects. To prevail, however, the Bishop Estate must show not only a discriminatory effect, but also discriminatory intent. *Village of Arlington Heights v. Metropolitan Housing Dev. Co.*, 429 U.S. 252 265, 97 S.Ct. 555, 563, 50 L.Ed.2d 450, (1977).

The Bishop Estate introduced no evidence of discriminatory intent on the part of the City. Instead, the Estate alleged that the City must have known that it and other Native Hawaiians owned numerous interests in leased condominiums and therefore that the City was aware the Ordinance would severely affect the Bishop Estate Trust and would harm the interests of Native Hawaiians. We agree with Judge Ezra that these allegations, even if true, do not present a prima facie case of discrimination. It is not enough to show that the City knew the law would affect Native Hawaiians. "Discriminatory purpose . . . implies more than an awareness of consequences." *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279, 99 S.Ct. 2282, 2296, 60 L.Ed.2d 870 (1979). Because the landowners offered no other evidence of discriminatory intent, summary judgment on their equal protection claim was appropriate.

2. *Small Landowners' equal protection claim*

The Small Landowners contend that the Ordinance violates their equal protection rights by grouping small landowners with owners such as the Bishop Estate, which owns many condominium projects. We disagree.

The Small Landowners do not contend they constitute a suspect class; hence, we will uphold the Ordinance if it

is rationally related to a legitimate state interest. *See Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312, 96 S.Ct. 2562, 2566, 49 L.Ed.2d 520 (1976). As explained above, the Ordinance furthers a legitimate state interest. *See supra* section II(B)(2). The Ordinance is rationally related to that interest. *See supra* section II(B)(3). Thus we hold Ordinance 91-95 does not violate the Small Landowners' equal protection rights.

III. ORDINANCE 91-96

A. *The Ordinance*

As noted above, the land underneath condominiums on Oahu ordinarily is owned by someone other than the owner of the condominium. The condominium owner leases the ground under the condominium, ordinarily for very long terms. In the typical lease, the rent initially is fixed for a term of years, after which the rent is subject to renegotiaton. The renegotiated rent is normally a percentage of the fair market value of the land appurtenant to the unit exclusive of improvements, as of the date of renegotiation. The rapid rise in Hawaiian land prices often results in renegotiated rent several hundred times greater than the initial fixed rent.

Ordinance 91-96 was enacted at the same time as Ordinance 91-95 and essentially is a rent control ordinance. The Ordinance accomplishes its goal in two ways. First, the Ordinance, which applies to all leases that contain provisions for renegotiation of lease rents for owner-occupied condominiums, limits the number and regulates the timing of renegotiations. Section 1.4 of the Ordinance provides that the first renegotiation shall not occur within fifteen years of the initial date of the lease, while subsequent renegotiations shall occur no sooner than every ten years.

Second, the Ordinance caps rents by linking the maximum renegotiated rent to the consumer price index. Section 1.5(b) of the Ordinance limits the renegotiated rent

to the initial rent multiplied by a rent factor. The initial rent is the greater of the rent specified by the lease and the reasonable rental value on the effective date of the lease. Honolulu City and County, Haw. Ordinance 91-96 § 1.1. The rent factor is the average consumer price index for the six-month period in which the rent renegotiation occurs, divided by the average consumer price index on the date of the initial lease. *Id.* § 1.5(b)(1)-(2).

The Ordinance also contemplates the conveyance of condominiums subject to renegotiated leases on the underlying land. Section 1.10 of the Ordinance facilitates the conveyance or transfer of these renegotiated leases. That section provides that, if an owner-occupant of a condominium conveys or transfers the leasehold interest in the underlying land during a renegotiated rent period to a person who intends to occupy the condominium apartment, the renegotiated land rent shall apply to the transferee tenant. *Id.* § 1.10. In other words, the owner-occupant of a condominium is free to convey his or her leasehold interest in the underlying land to a person intending to occupy the condominium and the transferee will receive the benefit of the renegotiated land lease. However, if the condominium is conveyed to someone who is not an owner-occupant, the lessor of the underlying land may reopen the negotiation. *Id.* § 1.13.

The Bishop Estate moved for summary judgment, contending that Ordinance 91-96 violates the Takings, Contract and Due Process Clauses. The district court ruled, at summary judgment, that the Ordinance violates the Takings Clause. The district court did not reach the Bishop Estate's Contract and Due Process Clause arguments.

The City and the HALE coalition each filed a timely notice of appeal.

B. *The Takings Clause*

The Bishop Estate argues that Ordinance 91-96 violates the Takings Clause in two ways. First, the Estate con-

tends that Ordinance 91-96 fails to substantially further its stated public purposes and, therefore, constitutes a regulatory taking because the Ordinance allows a lessee to monetize a below-market renegotiated rent at the expense of the lessor. Second, the Bishop Estate asserts that the Ordinance violates the Fifth Amendment because it fails to provide for consideration of individualized factors that might affect the value of the lease at the time of renegotiation. The City and HALE coalition argue that individualized consideration is not necessary and the alleged ground lease premium does not render the Ordinance unconstitutional. We turn to the Bishop Estate's argument that the Ordinance fails to substantially further a legitimate state interest.

A land use regulation, as noted above, does not effect a taking if it substantially furthers a legitimate state interest and does not deny the landowner economically viable use of his land. *Dolan*, 512 U.S. at 385, 114 S.Ct. at 2316-17. Ordinance 91-96 is designed to further the City's interest in maintaining affordable owner-occupied residential housing. Honolulu City & County, Haw. Ordinance 91-96, § 1. The Bishop Estate does not maintain that this is not a legitimate state interest, but rather asserts that the Ordinance fails to substantially further that interest. The Bishop Estate cites *Yee v. City of Escondido*, 503 U.S. 519, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992) in support of its argument.

Yee involved a rent control ordinance enacted by the City of Escondido that capped the rent a mobile home park owner could charge his lessees. *Yee*, 503 U.S. at 524, 112 S.Ct. at 1526-27. The Yees, owners of two mobile home parks, brought suit alleging that the rent control ordinance violated the Takings Clause. *Id.* at 525, 112 S.Ct. at 1527. They offered two arguments in support of their contention: (1) the rent control ordinance effected a physical taking of their property; and (2) the ordinance effected a regulatory taking of their property.

The Court did not reach the regulatory taking issue because that question was "not fairly included in the question on which we granted certiorari." *Id.* at 533, 112 S.Ct. at 1531. With respect to their physical taking argument, the Yees relied "heavily on their allegation that the ordinance benefits incumbent mobile home owners without benefiting future mobile home owners, who will be forced to purchase mobile homes at premiums." *Id.* at 530, 112 S.Ct. at 1529. The Court pointed out that this premium effect distinguished the Escondido ordinance from ordinary rent control statutes. Apartment tenants do not sell anything to their successors and, quite often, are statutorily precluded from charging "key money." *Id.* The ordinary rent control ordinance does not allow the lessee to monetize the present value of the reduced rent by conveying an apartment subject to a lease with a below market rent. Although the Court ultimately rejected the Yees' argument because "it has nothing to do with whether the ordinance causes a *physical* taking," *id.*, it noted that "[t]his effect might have some bearing on whether the ordinance causes a *regulatory* taking, as it may shed some light on whether there is a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance." *Id.* (citing *Nollan,* 483 U.S. at 834-35, 107 S.Ct. at 3147-48).

The Bishop Estate makes a similar challenge to Ordinance 91-96. It contends that the Ordinance's conveyance provisions create a premium, which an owner-occupant can capture when she sells a condominium subject to a renegotiated land rent. If the transferee intends to occupy the condominium, she recieves the benefit of the renegotiated rent. Hence, the transferor will charge a premium reflecting the net present value of the difference between the renegotiated land rent and the free market land rent.

The district court found that the Ordinance allowed a lessee to capture the present value of the below market land rent. *Richardson II,* 802 F.Supp. at 338. The Ordi-

nance's failure to regulate resales, according to the district court, effected a transfer of wealth from lessors to lessees. *Id.* Because of this transfer of wealth, which generally does not occur in the ordinary rent control ordinance, the court held that the Ordinance is unconstitutional. While we agree that the Ordinance effects a regulatory taking and, therefore is unconstitutional, we do so for somewhat different reasons than the district court.

The City enacted the Ordinance to provide renegotiated land lease rents "which are affordable to condominium apartment owner-occupants and fair to lessors" and to "maintain [affordable housing] for owner-occupants." The conveyance provision, as explained above, vitiates the cause-and-effect relationship between the property use restricted (rent rates) and the social evil the Ordinance seeks to remedy (lack of affordable housing). Despite this, the City and the Hale Coalition assert that it does not effect an unconstitutional regulatory taking. They assert that all land use regulations increase the value of some property while decreasing the value of other property.

Initially, we must determine whether the Bishop Estate's takings claim is ripe. "There are two independent prudential hurdles to a regulatory taking claim brought . . . in federal court." *Suitum v. Tahoe Regional Planning Agency*, —— U.S. ——, ——, 117 S.Ct. 1659, 1664, 137 L.Ed.2d 980 (1997). The first hurdle, that the plaintiff obtain a final decision regarding the application of the regulation to the property at issue from the entity charged with implementing the regulation, *id.* at ——, 117 S.Ct. at 1665, does not apply to facial regulatory takings claims. *Levald*, 998 F.2d at 686. Twice before we have characterized premium based challenges to a rent control statute as facial challenges. *See Carson Harbor*, 37 F.3d at 474 n. 5 ("In *Levald*, which involved similar facts, we noted that the premium is 'relevant only to a facial, not an as-applied, regulatory challenge.' "). The first hurdle thus does not apply to the Bishop Estate's argument.

"The second hurdle stems from the Fifth Amendment's proviso that only takings without 'just compensation' infringe that Amendment; 'if a State provides adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation clause until it has used the procedure and been denied just compensation.'" *Suitum*, —— U.S. at ——, 117 S.Ct. at 1665 (quoting *Williamson County*, 473 U.S. at 195, 105 S.Ct. at 3121 (1985)). Because the Bishop Estate's argument that the Ordinance does not substantially further a legitimate state interest does not depend upon the extent to which the Estate is compensated, its facial regulatory taking claim is ripe. *See Yee*, 503 U.S. at 534, 112 S.Ct. at 1532 ("As this [premium argument] does not depend on the extent to which petitioners are deprived of the economic use of their particular pieces of property or the extent to which these particular petitioners are compensated, petitioners' facial challenge is ripe."). We therefore turn to the merits of the Bishop Estate's argument.

Land use regulations do influence the value of property, but to be constitutional, they must do so in a manner that substantially furthers a legitimate government interest. *Nollan*, 483 U.S. at 834, 107 S.Ct. at 3147. Ordinance 91-96 does not do this. It regulates the use of the lessors' property interests in a manner that does not substantially further the goal of creating affordable housing. The absence of a mechanism that prevents lessees from capturing the net present value of the reduced land rent in the form of a premium, means that the Ordinance will not substantially further its goal of creating affordable owner-occupied housing in Honolulu. Incumbent owner occupants who sell to those who intend to occupy the apartment will charge a premium for the benefit of living in a rent controlled condominium. The price of housing ultimately will remain the same. The Ordinance thus effects a regulatory taking. *See id.* (regulation must substantially advance a legitimate state interest); *see also, Pennell v. San Jose*, 485 U.S. 1, 20, 108 S.Ct. 849, 862, 99 L.Ed.2d 1 (1988)

("Traditional land-use regulation (short of that which totally destroys the economic value of property) does not violate [the principle that one should not be forced to bear a burden which belongs to the public as a whole] because there is a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy.") (Scalia, J., concurring). We accordingly hold that Ordinance 91-96 violates the Fifth Amendment to the Constitution of the United States.[7]

IV. CONCLUSION

In summary, we hold that Ordinance 91-95 (the lease to fee ordinance) is constitutional. The Ordinance admittedly takes private property, but it does so for a sufficiently public purpose and no constitutional deprivation has as yet been established. Ordinance 91-96 (the rent control ordinance), on the other hand, is unconstitutional because it to substantially further a legitimate governmental interest. The respective judgments of the district courts are therefore

AFFIRMED.

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[7] In light of our conclusion that Ordinance 91-96 fails to substantially further a legitimate state interest, we need not reach either the Bishop Estates argument that it fails to provide for consideration of the characteristics of individual lessors or its other arguments.

O'SCANNLAIN, Circuit Judge, concurring in part and dissenting in part.

I join the court's opinion regarding the constitutionality of Ordinance 91-96. With respect to Ordinance 91-95, I concur in the court's conclusion in Part II-B that there is no violation of the Public Use Clause, but write separately to express concern about *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984). I respectfully dissent from Part II-C, however, because I believe that the challenge to Ordinance 91-95's compensation provision is ripe, and that the provision does not provide just compensation.

I

In Part II-B the court concludes that Ordinance 91-95 does not violate the Public Use Clause and relies heavily on *Hawaii Housing Authority v. Midkiff*.

A

The Fifth Amendment to the Constitution states: ". . . nor shall private property be taken for public use without just compensation." U.S. Const., amend V. The Public Use Clause is an explicit limit on the power of the government to take private property for, as the Supreme Court has long recognized, a taking must be for public use; a taking for a purely private use is unconstitutional. *See Thompson v. Consolidated Gas Corp.*, 300 U.S. 55, 80, 57 S.Ct. 364, 376, 81 L.Ed. 510 (1937).

Notwithstanding this principle, however, the Supreme Court in *Midkiff* gave the Public Use Clause an exceedingly broad reading: to satisfy the Clause, a taking need only be "rationally related to a conceivable public purpose." *Midkiff*, 467 U.S. at 241, 104 S.Ct. at 2329. "The 'public use' requirement is thus coterminous with the scope of a sovereign's police powers." *Id.* at 240, 104 S.Ct. at 2329; *Nat'l R.R. Passenger Corp. v. Boston & Maine*

Corp., 503 U.S. 407, 422-24, 112 S.Ct. 1394, 1404-05, 118 L.Ed.2d 52 (1992).

Since *Midkiff* was decided, however, the Supreme Court's regulatory takings jurisprudence has undergone considerable change. *See Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987). *Nollan*, *Lucas*, and *Dolan*, of course, dealt with a different area of takings jurisprudence, subject to a different set of rules than the one before us: here we have a challenge under the Public Use Clause whereas that trio dealt with regulatory takings.

Notwithstanding that the *Nollan-Lucas-Dolan* trio dealt with a different part of the Takings Clause, the landowners argue that these cases have modified *Midkiff*'s deferential review of a legislature's public use determination. The court rejects this argument, and I agree: the *Nollan-Lucas-Dolan* trio does not expressly modify or overrule *Midkiff*, and therefore we must apply *Midkiff* in this case. Indeed, recent Ninth Circuit authority confirms that *Midkiff* is still viable. *See Bay View, Inc. v. AHTNA, Inc.*, 105 F.3d 1281, 1286 (9th Cir.1997) ("After [*Midkiff*], a legislative determination of what constitutes 'public use' is subject to 'an extremely narrow' review, and will be upheld so long as it's rational."). *Midkiff*'s deferential standard compels me to conclude that Ordinance 91-95's taking serves a "conceivable public purpose."

B

Although *Midkiff* has not been overruled, and although *Nollan*, *Lucas*, and *Dolan* deal with a different part of the Takings Clause, I nevertheless believe that there is tension between these two lines of authority. The underlying thrust of the *Nollan-Lucas-Dolan* decisions—increasing the scrutiny of regulations to determine if they go "too far"

(enough to require compensation)—is inconsistent with *Midkiff*'s sweeping deference. It may be time for the Supreme Court to reconsider *Midkiff*.

To provide the context for this observation, I must take a brief detour. It seems to me that, speaking in broad terms, there are three ways the government can exercise control over property, especially real property. First, it can regulate pursuant to its broad police powers. Second, it can use its power of eminent domain to take the property without the consent of the owner as long as it pays just compensation. Third, it can buy land from a voluntary seller after negotiating a price—that is, it can use its revenues to behave like any other arm's length purchaser of private property. *See* Thomas W. Merrill, *The Economics of Public Use*, 72 Cornell L.Rev. 61, 72 (1986).

Nollan, *Lucas*, and *Dolan* dealt with the relationship between the first two categories. *Lucas* established when a government regulation goes too far. *See Lucas*, 505 U.S. at 1030, 112 S.Ct. at 2901 ("When . . . a regulation that declares "off-limits" all economically productive or beneficial uses of land goes beyond what the relevant background principle would dictate, compensation must be paid to sustain it."). *Nollan* and *Dolan* tightened the required fit between the legitimate purpose sought to be accomplished by a government regulation and the means chosen—thereby identifying some exercises of the police power as takings. A police power regulation will be treated as a taking—an exercise of eminent domain—requiring compensation unless it adequately fits its purposes; that is, unless there is an "essential nexus" between a legitimate state interest and the regulation. *See Dolan*, 512 U.S. at 385-87, 114 S.Ct. at 2317; *Nollan*, 483 U.S. at 837, 107 S.Ct. at 3148-49.

The *Nollan-Lucas-Dolan* trio therefore established that the Takings Clause is a limitation upon the state's police powers; if a regulation goes too far, or does not have the

right fit, then it must be treated as an exercise of eminent domain—a taking—which requires compensation. The Public Use Clause appears to serve the same sort of function, but with respect to the second and third categories—it limits the state's power of eminent domain. If an exercise of eminent domain goes too far—if it is for a private purpose, not a public one—then it cannot stand. If the state wants to acquire property in such circumstances (and has the statutory authority to do so), it may negotiate with the landowner to purchase the property at an agreed price, but it may not use its condemnation power.[1]

Because the *Nollan-Lucas-Dolan* trio increased the level of scrutiny given to police power regulations, identifying some of them as takings, it stands to reason that the same increased scrutiny should be given to outright condemnation. If a taking does not have the required fit—perhaps something like *Nollan*'s "essential nexus"—between its proclaimed public use and its actual effect, then it should be invalid under the Public Use Clause.

The court's opinion seeks to distinguish these cases, but I am unpersuaded. To the majority, the distinction is the provision of compensation: "[W]e see nothing inconsistent in applying heightened scrutiny when the taking is uncompensated, and a more deferential standard when the taking is fully compensated." Whereas the majority is correct that there is less reason to be suspicious of a fully compensated taking than an uncompensated one, more deference does not imply absolute deference. We ought not vitiate the public use requirement because, even if a landlord does receive the "fair market value" of the property, the landlord loses his right to exclude. Whether because

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[1] This is not to say that the Public Use Clause prohibits the government from possessing property for a non-public use; if the government with the statutory power to do so purchases the property from a voluntary seller, there is no taking at all because there is no use of eminent domain. The government becomes the owner with the consent of the seller.

of a sentimental attachment to his property or a conviction that the property is actually worth more than what the market will currently bear, a landlord might choose not to sell, even at the "fair market value." The landlord who refuses to sell is asserting his right to exclude. As the *Dolan* Court recognized, "th[e] right to exclude others is 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Dolan*, 512 U.S. at 393, 114 S.Ct. at 2320 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176, 100 S.Ct. 383, 391, 62 L.Ed.2d 332 (1979)). The public use requirement protects this right by limiting government encroachment on private property—by forcing the government to prove that it is upholding the public welfare and not merely transferring wealth to a class of persons with a stronger political voice.

Therein lies the mischief of *Midkiff*. Hopefully the Supreme Court will have the opportunity to extend its emerging takings jurisprudence to protect the right to exclude and to add vitality to the public use requirement. If the Clause is to have any effect at all, it must mean that a court will not feign blindness when it sees through a patently transparent legislative recital that a taking is for a public use. When the government uses eminent domain to take real property from A and give it to B, with no meaningful impact on anyone else or on the community at large, the taking is purely private and should violate the Public Use Clause.

In my view, Ordinance 91-95, unlike the statute in *Midkiff*, is a purely private taking. In *Midkiff*, the legislature was attempting to break up an oligopoly in land ownership—a remnant of Hawaii's feudal past—to allow single family home ownership. Breaking apart large blocks of land held by a small group of landowners—blocks which encompassed almost half the entire State of Hawaii—could be reasonably expected to spark more land transactions and lead to a more fluid real estate market.

See Midkiff, 467 U.S. at 232-33, 104 S.Ct. at 2324-25. That some economists might disagree with the legislature's remedy does not mean that the statute would be invalid—it retained an "essential nexus" to its purpose and would be constitutional.

In this case, however, the Honolulu City Council found no land oligopoly, but a mere concentration of land ownership in the hands of landowners (a tautology), many of whom refused to sell their land to their leasehold tenants (typically groups of highrise condominium owners), which in turn led to increased real property prices. As a remedy, when properly triggered, Ordinance 91-95 would condemn the property of the landowners and transfer it in pro rata shares to the condominium owners. It seems to me that the ordinance is nothing more than a naked transfer from one property owner to another—from landlords to tenants. To be sure, because tenants will be able to own land that they could not purchase in the open market, the ordinance might well make today's tenants better off, and will certainly eliminate their need to pay rent altogether. But transferring title to the tenants will not change the value of the property—which will still equal the combined value of the leasehold interest and the reversionary interest—and hence should not lower the price a seller will demand. If the landlords constituted an oligopoly, then the division of the ownership of the land could have the effect of lowering land prices from an oligopolistic level to something approaching the free-market level. In the absence of a showing of an oligopoly, however, Ordinance 91-95 has nothing to do with changing the structure of Hawaii's real estate market.

Nevertheless, *Midkiff*'s language limits the public use inquiry to whether there is a conceivable public purpose behind the law. Applying that deferential standard, I conclude that Ordinance 91-95 barely passes muster, and therefore I reluctantly concur in the court's conclusion that it does not violate the Public Use Clause.

II

In Part II-C of its opinion, the court concludes that the landowners' compensation claims are not ripe. It does so while theoretically recognizing the well-established rule that a party need not seek compensation when doing so would be futile under existing state law. *See Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 686 (9th Cir. 1993); *see also Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 196-97, 105 S.Ct. 3108, 3121-22, 87 L.Ed.2d 126 (1985).

Ordinance 91-95 sets the compensation for the taking as "the current fair market value of the leased fee interest." Ordinance 91-95, § 5.3. It defines the "leased fee interest" as the "reversionary interests of the fee owner." *Id.* at § 1.2.

By its plain meaning, the ordinance pays only the current fair market value of the landowner's reversionary interest. In other words, the landowner gets paid only for his interest in the property which excludes the leasehold. Conspicuously absent from this formula is any payment for the current stream of rental payments from the tenants to the landlord. Undoubtedly, the landlord has a protected property interest in the rental payments—a lessor's interest distinct from the reversionary interest in the land. Currently, the tenants pay rent to the landlord for the lease term. Under the ordinance, the tenants stop paying rent immediately upon condemnation. The landlord loses the stream of payments for the leasehold period but is not compensated for the loss.

In the court's view, Honolulu's Department of Housing and Community Development could interpret the compensation provision broadly and include the lost rental payments in the compensation formula. I do not think a fair (or even generous) reading of the ordinance will sustain that conclusion. The ordinance is clear: the landowners will get paid only for their "reversionary interests," which, as a matter of basic property law, do not include

the current income from the property. *See Black's Law Dictionary* 1186 (5th ed. 1979) (defining "reversionary interest" as "[t]he property that reverts to the grantor after the expiration of an intervening income interest"). The Supreme Court has recognized that merely compensating a lessor for the reversionary interest is insufficient:

> "[W]hen a lease of trust land is made, . . . upon a subsequent condemnation by the United States, the trust must receive the then full value of the reversionary interest that is subject to the outstanding lease, *plus, of course, the value of the rental rights under the lease.*"

Alamo Land & Cattle Co., Inc. v. Arizona, 424 U.S. 295, 303, 96 S.Ct. 910, 916, 47 L.Ed.2d 1 (1976) (emphasis added). The landlord must receive the value of the leased payments because that is the difference between what is taken by the government (a present fee simple) and the fair market of the "reversionary interests."

The court reaches the incorrect result because its analysis is incomplete. After noting that what reverts back to the landlord is a fee interest, the court states that "[t]he projected earning of that property would be a normal factor in determining the value of the property that reverts to the lessor." The court is correct in that what reverts back is a fee interest, and that the value of a fee interest takes into account all projected earnings. The court does not recognize, however, that a reversionary interest in fee simple is a lesser estate than a present fee simple, and that the difference is the interim lease payments. One can view the value of property as the sum of the discounted *future* cash flows. A reversionary interest is less valuable than a present fee simple because the value of a reversionary interest does not include the rent payments made prior to reversion, as those would be *past* cash flows.

Thus, to provide just compensation, Hawaii must pay the landlords the value of the reversionary interest plus the present value of the lease payments. There is no need to

wait and see how the Department administers Ordinance 91-95, for unless the ordinance means something other than what it very clearly says, it does not authorize the Department to give landowners just compensation. In light of the plain meaning of the ordinance, any compensation paid by Honolulu to the landowners would be constitutionally inadequate. The formality of pursuing such compensation would therefore be futile. For that reason, I would conclude that the landowners' compensation claims are ripe for review, and that the district court's order should be reversed to that extent.

APPENDIX B

UNITED STATES DISTRICT COURT
D. HAWAII

Civ. No. 91-00725 DAE

WILLIAM S. RICHARDSON, *et al.*,
Plaintiffs,
v.
CITY AND COUNTY OF HONOLULU,
Defendant,
and
HALE COALITION,
Intervenor.

Sept. 16, 1992

ORDER GRANTING IN PART AND DENYING IN PART MOTIONS FOR SUMMARY JUDGMENT AND CERTIFYING QUESTION TO HAWAII SUPREME COURT

DAVID ALAN EZRA, District Judge.

This court heard the parties' motions for summary judgment on August 10, 1992.

BACKGROUND

On December 4, 1991, the City Council of defendant City and County of Honolulu [1] passed Bills 156 (1990) and 36 (1991) which were later enacted on December 18,

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[1] The court will refer to the City and County of Honolulu as "Honolulu" when discussing the geographical location and as "the City" when addressing the defendant political entity.

1991 as Ordinances 91-95 and 91-96, respectively. Ordinance 91-95 involves a mechanism for the transfer of the fee simple interest of leasehold property from condominium lessors to condominium lessees in Honolulu. Ordinance 91-96 imposes a ceiling on renegotiated lease rents for ground leases of owner-occupied residential condominium units in Honolulu.

On December 18, 1991, the date of enactment of the aforementioned ordinances, the plaintiff Trustees of the Kamehameha Schools/Bernice Pauahi Bishop Estate ("Bishop Estate") filed the present action alleging that both ordinances are unconstitutional. Bishop Estate asserts the following specific causes of action:

> Count I—Deprivation of constitutional rights in violation of 42 U.S.C. § 1983;
>
> Count II—Ordinance 91-96 is facially unconstitutional in that it effects an impermissible taking in violation of the Fifth and Fourteenth Amendment;
>
> Count III—Ordinance 91-96 is facially unconstitutional in that it violates Bishop Estate's substantive due process rights under the Fifth and Fourteenth Amendments;
>
> Count IV—Ordinance 91-96 is facially unconstitutional in that it violates Bishop Estate's procedural due process rights under the Fourteenth Amendment;
>
> Count V—Ordinance 91-96 is facially unconstitutional in that it violates Bishop Estate's equal protection rights under the Fourteenth Amendment;
>
> Count VI—Ordinance 91-96 unreasonably and substantially impairs Bishop Estate's contract rights in violation of Article I, Section 10 of the Constitution;
>
> Count VII—Ordinance 91-95 is facially unconstitutional in that it effects an impermissible taking in violation of the Fifth and Fourteenth Amendments;

Count VIII—Ordinance 91-95 is facially unconstitutional in that it violates Bishop Estate's substantive due process rights under the Fifth and Fourteenth Amendments;

Count IX—Ordinance 91-95 is facially unconstitutional in that it violates Bishop Estate's equal protection rights under the Fourteenth Amendment;

Count X—Ordinance 91-96 violates several provisions of the Constitution of the State of Hawaii;

Count XI—Ordinance 91-95 violates several provisions of the Constitution of the State of Hawaii;

Count XII—Ordinance 91-96 conflicts with various statutes of the State of Hawaii; and

Count XIII—Ordinance 91-95 conflicts with various statutes of the State of Hawaii.

Bishop Estate seeks declaratory relief as well as attorneys' fees, costs, and interest.

On February 14, 1992, Bishop Estate filed a motion for partial summary judgment on Counts I, II, III, VI, XII, and XIII. On June 8, 1992, the HALE Coalition filed a motion for partial summary judgment on the remaining counts of the complaint. On June 9, 1992, the City filed a cross motion for summary judgment on all counts.

DISCUSSION

I. ORDINANCE 91-96

A. *Background*

Ordinance 91-96 imposes a ceiling on renegotiated lease rents for ground leases of owner-occupied residential condominium units in Honolulu. In the "Findings and Purpose" section of Ordinance 91-96, the City found that there were 25,203 owner-occupied condominium housing units in Honolulu in 1987. Ord. 91-96 § 1(1)(A). The

City further found that 16,291 of such units, or approximately 65% of the total, were on leased land.[2] *Id.* § 1(1)(B). The City indicated that residential leaseholds have had, and continue to have, numerous undesirable socio-economic effects including: increases in lease rental negotiations of up to 1,000%; inequality of bargaining power favoring lessors; and increasing lease rentals forcing lessees to give up their leases and look for other accommodations. In sum, the City stated:

> The purpose of this Ordinance is to set maximum renegotiated lease rents which are affordable to condominium apartment owner-occupants and fair to lessors. This Ordinance is intended to be in conformance with [*Richardson I*].[3]

Ordinance 91-96 applies to all leases that contain provisions for renegotiation of lease rents for individual residential owner-occupant apartments. Ord. 91-96 § 1.3. An "owner-occupant" is defined as an owner of a residential apartment who, on the date of renegotiation of the lease of the residential apartment, occupies the residential apartment as the owner's principal residence. *Id.* § 1.2(a). Pursuant to the ordinance, the first renegotiation shall not be scheduled before the fifteenth year following the initial date of the lease and subsequent renegotiations shall occur no more frequently than every ten years. *Id.* § 1.4(a)(1).

Ordinance 91-96 provides that the maximum annual renegotiated lease rent shall be the initial lease rent multiplied by a rent factor. *Id.* § 1.5(b). The "initial lease rent" is the greater of the beginning lease rent specified in the lease or the reasonable market value rent prevail-

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[2] The City indicated that it had no reason to believe that this data had changed appreciably since 1987. Ord. 91-96 § 1(2).

[3] In *Richardson v. City and County of Honolulu*, 759 F.Supp. 1477 (D.Haw.1991) ("*Richardson I*"), this court declared unconstitutional Ordinance 91-96's predecessor, Ordinance 90-95. *Richardson I* is discussed at length later in this opinion.

ing at the effective date of the lease.[4] *Id.* § 1.1. Furthermore, the "rent factor" is the average consumer price index ("CPI")[5] for the six-month period in which the rent negotiation occurs divided by the average CPI in effect at the time of the effective date of the initial lease rent. *Id.* § 1.5(b).

When a lease comes up for renegotiation, the lessor and lessee are encouraged to attempt to reach agreement as to the renegotiated lease rent. *Id.* § 1.4(b). If the parties are unable to reach an agreement, however, they must proceed to arbitration. *Id.* If the lease at issue is subject to section 516D-12 of the Hawaii Revised Statutes, the arbitration shall proceed pursuant to chapter 516D. *Id.* Otherwise, the City Department of Housing and Community Development (the "Department") shall arbitrate the matter. *Id.* The Department is also charged with enforcing the provisions of Ordinance 91-96. *Id.* § 1.14.

Ordinance 91-96 also provides a mechanism for adjusting the renegotiated lease rent biennially in order to account for further changes in the CPI. *Id.* § 1.6. Furthermore, under certain narrowly-defined circumstances, the ordinance allows for an administrative adjustment of annual renegotiated lease rent to an amount higher than the maximum annual renegotiated lease rent. *Id.* § 1.7. In general terms, a lessor may petition the Department for an administrative adjustment when the lessor pays the operating expenses from lease rent proceeds and the

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[4] In the definition of "initial lease rent," the ordinance states that initial lease rent "excludes any lease rents that reflect reduced rent at the beginning of the lease due to construction of the project or due to special negotiations between the developer and the land owner." Ord. 91-96 § 1.1.

[5] CPI is defined as "the Consumer Price Index for All Urban Consumers (CPI-U) for Honolulu published by the Bureau of Labor Statistics of the United States Department of Labor." Ord. 91-96 § 1.1.

lessor's current net operating income is less than the lessor's net operating income in the last year of the fixed rent period. *Id.* § 1.7(c). When authorized, the lease rent shall be adjusted so that the net operating income, as adjusted for inflation measured by the CPI, stays the same as the net operating income in the last year of the fixed rent period. *Id.* § 1.7(b), (c). Either the lessor or lessee may appeal the Department's approval, or modification of a proposed adjusted lease rent. *Id.* § 1.7(g).

Every renegotiated lease rent, whether set by agreement or arbitration, must be submitted to the Department for certification that the rent is within the applicable maximum. *Id.* § 1.9. The renegotiated lease rent shall be deemed within the maximum unless, within thirty days of the submission of the renegotiated lease rent, the Department certifies that such rent is not within the maximum. *Id.* § 1.9(d). If the Department rejects the proposed renegotiated lease rent, the lessor and lessee must continue their renegotiation. *Id.*

Any party aggrieved by the Department's action or inaction may appeal to the Department. *Id.* § 1.9(e). Upon the filing of an appeal, the Department shall (1) hold a hearing in accordance with the contested case procedures of Chapter 91 of the Hawaii Revised Statutes, and (2) issue an appropriate decision.[6] *Id.*

If an owner-occupant transfers his leasehold interest during a renegotiated rent period to another person intending to be an owner-occupant, the renegotiated lease

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[6] The drafters of Ordinance 91-96 apparently attempted to take into account the potential conflict between Hawaii Revised Statutes chapter 658 which governs the finality of arbitration awards and section 1.9 of Ordinance 91-96. Section 1.9(f) provides that if a court of competent jurisdiction rules, or the state attorney general or corporation counsel opines, that a renegotiated lease rent set by arbitration may be vacated, modified, or corrected only pursuant to chapter 658, then a petition seeking such action shall be subject to chapter 658 and the parties may not appeal to the Department.

rent shall be applicable to the new owner-occupant. *Id.* § 1.10. However, if an apartment owner ceases to be an owner-occupant or if an owner-occupant transfers his leasehold interest to a person who is not an owner-occupant, the lessor may reopen the negotiated lease rent. *Id.* § 1.12, 1.13. Once reopened, the renegotiated lease rent must be set in accordance with the lease agreement and without regard to the provisions of Ordinance 91-96. *Id.*

B. *The Takings Clause (Count II)*

1. Richardson I

In *Richardson v. City and County of Honolulu,* 759 F.Supp. 1477 (D.Haw.1991) ("*Richardson I*"), this court considered the constitutionality of Ordinance 91-96's statutory predecessor, Ordinance 90-95. This court held that Ordinance 90-95 violated the Takings Clause of the United States Constitution. As the City drafted Ordinance 91-96 so as to attempt to correct the constitutional deficiencies of Ordinance 90-95, it is necessary to review *Richardson I.*

Ordinance 90-95 was designed to impose a maximum ceiling on renegotiated lease rents for residential condominiums in Honolulu. The ordinance provided that the renegotiated annual ground rent shall not exceed the initial lease rent paid at the beginning of the lease term multiplied by a "rent factor." *Richardson I,* 759 F.Supp. at 1479. The rent factor was an average of an "inflation factor" and an "income factor." *Id.* The lessors were bound by the rent figure determined by this formula regardless of whether the initial rent paid by the lessee reflected the market value of the property at the time the lease began. *Id.* at 1480.

The court further explained:

> The maximum renegotiated rents mandated by the Ordinance apply for the full renegotiated rent period

> and are not readjusted to reflect changes in the [indexes for the inflation and income factors] which might occur during that time. The Ordinance does not take into consideration the location or any other unique or particular characteristics of the property. There is no administrative procedure for appeal, and no governmental body has been established or designated in the Ordinance for the purpose of interpreting and applying the Ordinance's provisions.

759 F.Supp. at 1480.

The court held that Ordinance 90-95 was unconstitutional under the Fifth Amendment's Takings Clause because: (1) the ordinance did not allow lessors a reasonable rate of return; and (2) the ordinance's means did not rationally further its public purpose.

The court found that Ordinance 90-95 on its face deprived lessors of a just and reasonable rate of return because the rent ceiling was based on the amount of rent paid by the lessee during the first year of the lease. 759 F.Supp. at 1489. The undisputed evidence in the case showed that the rent paid by lessees during the first year of their leases was often far below market value. *Id.* at 1490. The court further determined that Ordinance 90-95 was unconstitutional because it did not provide a mechanism for periodic review of the rent ceilings imposed in order to ensure that lessors are continuously afforded a fair rate of return. *Id.* at 1491.

Additionally, while the court found that Ordinance 90-95 had a legitimate public purpose, it determined that the ordinance did not reasonably further the ordinance's goal of reducing the cost of leasehold housing for the people of Hawaii. 759 F.Supp. at 1493. The evidence in the case demonstrated that the ordinance applied to numerous types of condominiums which are not rented by lessees seeking residential housing. *Id.* at 1494. In fact, the evidence showed that only about 37% of all residential lease-

hold condominiums on Oahu were owner-occupied. As Ordinance 90-95 applied only to renegotiated annual ground rents, the court noted that it was inapplicable to sublessees who are the majority of the occupiers of condominiums.

The court summarized the problems of Ordinance 90-95 as follows:

> To the extent that the drafters intended to provide renters with more affordable housing, the approach chosen by the drafters of Ordinance 90-95 is not constitutionally rational. First, the Ordinance does not place any restrictions on rents charged to occupants by sublessors. Second, the terms of the Ordinance apply not only to residential condominiums but also to commercial condominiums. Third, the Ordinance does not take into consideration the individual characteristics or market value of any piece of property in determining the maximum allowable renegotiated rent. Finally, no governmental agency has been designated to interpret the Ordinance, oversee its application, or evaluate whether the rent ceiling is reasonable in every case.

759 F.Supp. at 1494.

While the court determined that Ordinance 90-95 was unconstitutional, the court noted:

> Careful review and analysis of constitutional law and precedent convinces this court that a properly crafted ordinance, the purpose of which is to limit lease rent increases, can pass constitutional muster. . . . This court *does* not hold that *every* effort to regulate rent renegotiations would be unconstitutional. Rather, the court finds that *this particular ordinance* is unconstitutionally overbroad.

Id. at 1479, 1488.

2. General Taking Analysis

The Takings Clause of the Fifth Amendment to the United States Constitution states that "private property [shall not] be taken for public use, without just compensation." The Takings Clause applies to the states through the Fourteenth Amendment. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 244 n. 7, 104 S.Ct. 2321, 2331 n. 7, 81 L.Ed.2d 186 (1984). Moreover, a state may delegate its power to condemn to a municipality. *Cf. Jacobson v. Tahoe Regional Planning Agency*, 566 F.2d 1353 (9th Cir.1977), *aff'd in part and rev'd in part on other grounds*, 440 U.S. 391, 99 S.Ct. 1171, 59 L.Ed.2d 401 (1979). "When the power to condemn has been delegated to a municipality, the municipality acts under color of state law, and therefore the prohibitions of the fifth and fourteenth amendments apply." *Richardson I*, 759 F.Supp. at 1487.

The Supreme Court has consistently distinguished "physical takings" from "regulatory takings." A physical taking occurs when a governmental entity authorizes a permanent physical occupation of real property. On the other hand, the regulatory taking issue typically arises when a government regulation, such as a zoning regulation or a rent control law, affects a property owner's ability to use his land. The distinction between a physical taking and a regulatory taking is significant because the Supreme Court has applied vastly different standards to the two types of takings.

3. Physical Taking

The Supreme Court addressed at length the issues regarding a physical taking in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982). In that case, the defendant cable television company installed a cable on the roof of the plaintiff's apartment building. The company's actions were in accordance with a New York law which required

a landlord to permit a cable television company to install its cable facilities upon his property. The issue in the case was "whether a minor but permanent physical occupation of an owner's property authorized by government constitutes a 'taking' of property for which just compensation is due under the Fifth and Fourteenth Amendments of the Constitution." *Id.* at 421, 102 S.Ct. at 3168. The Supreme Court held that any permanent physical occupation constitutes a per se taking thereby requiring just compensation. *Id.* at 426-441, 102 S.Ct. at 3170-79.

The instant case does not involve an actual permanent physical occupation as was present in *Loretto*. Nonetheless, Bishop Estate relies on a series of decisions from the courts of appeals which held that certain mobile home park rent control ordinances effected "physical takings," similar to the type of taking in *Loretto*. These ordinances allegedly transferred possessory rights in the moblie home park from the owners to the tenants by essentially giving tenants a transferable right to a perpetual lease at below-market rental rates. *See Azul Pacifico, Inc. v. City of Los Angeles*, 948 F.2d 575 (9th Cir.1991), *opinion withdrawn on other grounds*, 973 F.2d 704 (9th Cir. 1992);[7] *Pinewood Estates v. Barnegat Township Leveling Bd.*, 898 F.2d 347 (3d Cir.1990); *Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th Cir.1986), *cert. denied*, 485 U.S. 940, 108 S.Ct. 1120, 99 L.Ed.2d 281 (1988).

The physical taking analysis in the aforementioned cases, however, was overruled by the Supreme Court's recent opinion in *Yee v. City of Escondido*, —— U.S.

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[7] In *Azul-Pacifico*, the Ninth Circuit granted a petition for rehearing and withdrew its previous decision reported at 948 F.2d 575. On rehearing, the court did not address the takings clause issues, but it vacated the lower court's judgment on other grounds. In particular, the court held: (1) the plaintiff could not bring a direct constitutional claim without utilizing 42 U.S.C. § 1983; and (2) the claims were barred by the statute of limitations.

——, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992). In *Yee*, the plaintiff mobile home park owners challenged a local mobile home park rent control ordinance. The park owners alleged that the ordinance constituted a physical taking under *Loretto*.[8] Rejecting the owners' arguments, the Supreme Court held that a physical taking occurs only when the government requires the landowner to submit to the physical occupation of his land. *Id.* 112 S.Ct. at 1528. The Court emphasized that the mobile home park owners voluntarily rented their land to the tenants; the park owners' tenants were invited by the park owners, not forced upon them by the government. *Id.* The Court explicitly rejected the rationale of *Hall* and *Pinewood Estates*. *Id.* at 1527 ("We granted certiorari . . . to resolve the conflict between the decision below [dismissing the complaint] and those of two of the federal Courts of Appeals in *Hall* [and *Pinewood Estates.*]).

Additionally, the Court found that the factual circumstances in *Yee* were similar to the case of *FCC v. Florida*

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[8] The Court summarized plaintiffs' argument as follows:

> Because under the California Mobilehome Residency Law the park owner cannot evict a mobile home owner or easily convert the property to other uses, the argument goes, the mobile home owner is effectively a perpetual tenant of the park, and the increase in the mobile home's value thus represents the right to occupy a pad at below-market rent indefinitely. And because the Mobilehome Residency Law permits the mobile home owner to sell the mobile home in place, the mobile home owner can receive a premium from the purchaser corresponding to this increase in value. The amount of this premium is not limited by the Mobilehome Residency Law or the Escondido ordinance. As a result, petitioners conclude, the rent control ordinance has transferred a discrete interest in land—the right to occupy the land indefinitely at a sub-market rent—from the park owner to the mobile home owner. Petitioners contend that what has been transferred from park owner to mobile home owner is no less than a right of physical occupation of the park owner's land.

112 S.Ct. at 1528.

Power Corp., 480 U.S. 245, 107 S.Ct. 1107, 94 L.Ed.2d 282 (1987). In that case, the plaintiff utility company leased space on its utility poles to cable television companies for the installation of cables. Pursuant to federal agency action, the annual rent of several cable companies was reduced from between $7.15—$5.50 per pole to $1.79 per pole annual rent. Rejecting the utility's physical taking argument, the Supreme Court explained:

> [The utility contends,] in essence, that it is a taking under *Loretto* for a tenant invited to lease at a rent of $7.15 to remain at the regulated rent of $1.79. But it is the invitation, not the rent, that makes the difference. The line which separates these cases from *Loretto* is the unambiguous distinction between a commercial lease and an interloper with a government license.

Pursuant to the Supreme Court's holdings in *Florida Power* and *Yee*, this court finds that there is no physical taking in the present case. In support of their physical taking allegation, Bishop Estate relies almost entirely on *Hall*, *Pinewood Estates*, and *Azul-Pacifico*. Yet the physical taking rationale of these cases was specifically rejected in *Yee*. Moreover, the condominium lessees in the present case are entirely analogous to the tenants in *Florida Power* and *Yee*. The lessees are occupying their condominiums as a result of leases extended by the lessors, not as a result of governmental mandate. The City did not require the lessors to be subject to physical occupation of their land.

4. Regulatory Taking

a. *Applicable Law*

The long-standing rule regarding regulatory takings was enunciated by Justice Holmes: "while property may be regulated to a certain extent, if regulation goes too far it

will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 160, 67 L.Ed. 322 (1922). With respect to the regulation of housing, the Supreme Court has indicated:

> This Court has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all injuries that such regulation entails. . . . So long as these regulations do not require the landlord to suffer the physical occupation of a portion of his building by a third party, they will be analyzed under the multifactor inquiry generally applicable to nonpossessory governmental activity.

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 440, 102 S.Ct. 3164, 3178, 73 L.Ed.2d 868 (1982) (citing, among others, the following two rent control cases: *Bowles v. Willingham*, 321 U.S. 503, 64 S.Ct. 641, 88 L.Ed. 892 (1944); and *Block v. Hirsh*, 256 U.S. 135, 41 S.Ct. 458, 65 L.Ed. 865 (1921)).

The seminal case regarding regulatory takings is *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). In that case, pursuant to the City of New York Landmarks Preservation Law,[9] the Grand Central Terminal ("Terminal"), owned by plaintiff Penn Central Transportation Company ("Penn Central"), was designated as a historical landmark.

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[9] The City of New York enacted the Landmarks Preservation Law which created a commission having the power to designate historic landmarks in New York City. Once a site is designated as a landmark numerous restrictions attach to the property owner's use of the property. In order to partially offset the effect of these restrictions, landmark owners who have not developed their property to the extent otherwise allowed by the general zoning laws are allowed to transfer their development rights to other parcels in the vicinity. 438 U.S. at 109-114, 98 S.Ct. at 2651-54.

After Penn Central's proposal to build a 55-story office building on top of the Terminal was rejected,[10] it filed suit alleging that the application of the Landmarks Preservation Law to the terminal constituted a "taking" in violation of the Fifth and Fourteenth Amendments.

The Supreme Court held there was no taking. The Court explained that the taking analysis involves essentially ad hoc, factual inquires involving several factors. 438 U.S. at 124, 98 S.Ct. at 2659. The Court indicated that a court must consider the economic impact of the regulation on the plaintiff, the extent to which the regulation has interfered with distinct investment-backed expectations, and the character of the government action. *Id.*

The Supreme Court rejected Penn Central's argument that the Landmarks Preservation Law effected a taking because its operation significantly diminished the value of the Terminal site. 438 U.S. at 131, 98 S.Ct. at 2662. Of particular importance, the Court noted that Penn Central had conceded that the parcel of land occupied by the Terminal was, at the time of the lawsuit, capable of earning a reasonable return. *Id.* at 129, 98 S.Ct. at 2661. Accordingly, the Court held that while the Landmark Preservation Law undeniably interfered with Penn Central's profit-making ability, the law still afforded Penn Central a reasonable return on its investment. 438 U.S. at 136-37, 98 S.Ct. at 2665-66.

While *Penn Central* provides the general framework for evaluating a regulatory taking claim, subsequent federal and state cases have refined the analysis with respect to rent control laws. A rent control scheme must guarantee efficient landlords/lessors a just and reasonable rate of return on their investments. *Pennell v. City of San Jose*, 485 U.S. 1, 13, 108 S.Ct. 849, 858, 99 L.Ed.2d 1

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[10] Penn Central would have received $1-3 million annually from the proposed project.

(1988); *Cromwell Assocs. v. Newark*, 511 A.2d 1273, 1275 (N.J.Super.Ct.Law Div.1985) (rejecting any percentage limitation on a landlord's ability to seek rent increases under a landlord hardship provision). In addition to the just and reasonable rate of return requirement, rent control legislation must substantially advance legitimate public interests. *Richardson I*, 759 F.Supp. at 1493 (citing *Agins v. City of Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980)).

b. *Individualized Consideration*

As indicated above, this court set forth four reasons in *Richardson I* why the approach of Ordinance 90-95, Ordinance 91-96's predecessor, did not substantially advance the purpose of the law. One of the stated problems with Ordinance 90-95 was that "the Ordinance [did] not take into consideration the individual characteristics or market value of any piece of property in determining the maximum allowable renegotiated rent." *Richardson I*, 759 F.Supp. at 1494-96. In drafting Ordinance 91-96, the City failed to adequately address this significant defect.

The requirement of individualized consideration is apparent from other cases which have addressed taking issues. For example, in *Midkiff*, the United States Supreme Court upheld the State of Hawaii's Land Reform Act of 1967. Yet the Land Reform Act allowed the parties affected by the condemnation to present evidence of the fair market value of the subject property. *Midkiff*, 467 U.S. at 234 & n. 2, 104 S.Ct. at 2326 & n. 2 (citing Haw. Rev.Stat. § 516-56); *see also Richardson I*, 759 F.Supp. at 1494-96.

With respect to taking challenges to rent control laws, courts have recognized:

> The very nature of rent control requires that a limit be placed on rent increases. Such limits have

> been held valid providing a safety valve, such as a hardship mechanism, exists which can assure an efficient landlord a fair return. . . . "[E]very rent control ordinance must be deemed to intend, and will be so read, to permit property owners to apply to the local administrative agency for relief on the ground that the regulation entitles the owner to a just and reasonable return."

Cromwell Assocs. v. Newark, 511 A.2d 1273, 1275 (N.J.Super.Ct.Law Div.1985) (citing and quoting *Hutton Park Gardens v. West Orange Town Council*, 68 N.J. 543, 350 A.2d 1 (1975)).

Recent cases which have upheld rent control laws have involved statutes which provided for some degree of individualized consideration. For instance, under the rent control scheme in *Pennell v. City of San Jose*, 485 U.S. 1, 108 S.Ct. 849, 99 L.Ed.2d 1 (1988), when a tenant objected to a landlord's proposed rent increase, a hearing officer would determine the reasonableness of the proposed increase. *Id.* at 5, 108 S.Ct. at 853. The rent control ordinance required that the hearing officer examine "the history of the premises, the landlord's costs, and the market for comparable housing." *Id.* at 13, 108 S.Ct. at 858. The ordinance also allowed the landlord to present any other relevant financial evidence pertaining to the property. *Id.*

Moreover, even rent control schemes which have been declared unconstitutional have typically contained some mechanism for individualized consideration. *See, e.g., Birkenfeld v. City of Berkeley*, 17 Cal.3d 129, 130 Cal. Rptr. 465, 493, 550 P.2d 1001, 1029 (1976) (landlords may petition rent control board for a rent adjustment); *Cromwell Assocs.*, 511 A.2d at 1274 (rent control ordinance permitted board-approved increases in cases where the proofs demonstrate that a particular hardship forecloses on a landlord's ability to obtain a fair rate of re-

turn defined by the ordinance as an 11.5% return on investment).

In *Yee v. Escondido*, —— U.S. ——, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992), the mobile home rent control ordinance in question prohibited rent increases without the approval of the city council. *Id.* 112 S.Ct. at 1527. However, mobile home park owners were allowed to apply for a rent increase at any time. *Id.* The city council was required to approve any increases which it deemed "just, fair, and reasonable" after considering a non-exclusive list of eleven factors most of which pertained to the individual mobile home pads at issue. *Id.*

In contrast to the aforementioned cases, absolutely nothing in Ordinance 91-96's regulatory scheme accounts for the many unique factors, such as the rate of development in surrounding areas, which may affect the value of an individual parcel of real property at the time of renegotiation. At the hearing, the City conceded this fact.[11] To reiterate, the maximum annual renegotiated lease rent under the provisions of Ordinance 91-96 is determined solely on the basis of the *initial lease rent* and the *rent factor derived from the CPI*. The problem of lack of individual consideration in determining the renegotiated lease rent is compounded by the absence of any mechanism, such as a variance, for obtaining relief for special circumstances. *See Cromwell Assocs. v. Newark*, 511

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[11] The City argued that individual considerations are accounted for in the setting of the initial lease rent at the time the lease is originated. While this may be true, the individual characteristics of a piece of property often are significantly different at the time of renegotiation than they were at the initial date of the lease which could be several decades earlier. This court need only call attention to the massive redevelopment presently underway in the Kakaako area and the planned substantial redevelopment of the Honolulu waterfront. Both of these redevelopment projects are within the City and County of Honolulu and will without question have a marked effect on property values in condominiums within, abutting, or in the vicinity of these areas.

A.2d 1273, 1275 (N.J.Super.Ct.Law Div.1985) (discussing the need for a safety valve or hardship mechanism with respect to rent control laws).

Ordinance 91-96's lack of individualized consideration is further exacerbated by the notable absence of any meaningful review process. *See Birkenfeld v. City of Berkeley*, 17 Cal.3d 129, 130 Cal.Rptr. 465, 550 P.2d 1001 (1976). In *Birkenfeld*, the California Supreme Court recognized that even when a rent control ordinance provides adequate standards for determining rental rates, the ordinance must provide procedural safeguards against unfairness in situations where the statutorily-determined rate would be unfair. *Id.* 130 Cal.Rptr. at 493-97, 550 P.2d at 1029-32.

The arbitration and appeal process in Ordinance 91-96 is focused exclusively on determining the correct initial lease rent and the rent factor from which the maximum annual renegotiated lease rent is calculated. The ordinance does *not* permit the arbitrator or the Department of Housing and Community Development to consider any other factors. At the hearing on these motions, the City conceded that the arbitration and appeal procedures are restricted to solely determining whether the maximum annual renegotiated lease rent is calculated properly under the statutory formula.

A review of the arbitration and appeal mechanism of Ordinance 91-96 reveals its inadequacies. If the lessor and lessee are unable to agree on an renegotiated lease rent, the parties must proceed to arbitration. Ord. 91-96 § 1.4(b). In arbitration, however, the arbitrator is restricted to determining the maximum renegotiated lease rent pursuant to the ordinance's formula of initial lease rent multiplied by the rent factor. *Id.* § 1.5. The arbitrator has no authority or discretion to consider any other factors in determining the maximum renegotiated lease rent. Furthermore, while all renegotiated lease rents must be certified by the City Department of Housing and Com-

munity Development, the Department's role is similarly restricted to merely ensuring compliance with the statutory formula for determining maximum renegotiated lease rent. *Id.* § 1.9.[12]

The City contends that lessors are ensured a fair rate of return by Ordinance 91-96's two types of adjustments: (1) the biennial adjustment for inflation (§ 1.6); and the administrative adjustment for increased operating expenses (§ 1.7). The court finds that neither of these adjustments provides the type of relief which is constitutionally mandated.

The biennial adjustment allows the previously determined maximum renegotiated lease rent to increase in accordance with the average consumer price index. Ord. 91-96 § 1.6. However, if the maximum renegotiated lease rent is originally set at a confiscatory rate, the biennial adjustment provides no relief from that confiscatory rate.[13] In other words, if the renegotiated lease rent is originally set at a confiscatory rate, the biennial adjustment merely prevents that confiscatory rate from becoming even more confiscatory by attempting to adjust the rate for inflation.

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[12] In addition, any party aggrieved by the Department's action or inaction may appeal to the Department under the contested case procedures of chapter 91 of the Hawaii Revised Statutes. Ord. 91-96 § 1.9(e). Nonetheless, on appeal, there is no evidence to suggest that the Department has the authority to provide any form of relief other than ensuring compliance with Ordinance 91-96's rent formula. Furthermore, this appeal process may be nullified if a court rules, or the State attorney general or the City corporation counsel opines, that the right to appeal to the Department conflicts with chapter 658 of the Hawaii Revised Statutes.

[13] Additionally, the court notes that the lessor is not automatically entitled to the biennial adjustment; the Department must approve such an adjustment. Ord. 91-96 § 1.6(a). As Ordinance 91-96 contains no standards for the Department to apply in determining whether to grant a biennial adjustment, the Department apparently has unlimited discretion to either grant or deny a biennial adjustment.

With respect to the administrative adjustment, that provision only applies if the lessor pays the operating expenses for the condominium exclusively from the lease rent proceeds. Ord. 91-96 § 1.7(c)(2), (d)(3). However, the uncontradicted evidence before the court indicates that lessors "almost never assume the obligation to pay a condominium project's operating expenses, and if such an obligation is assumed, the expenses are not paid exclusively from lease rent proceeds, but are paid through separate charges." Aff. of Paul J. Cathcart ¶ 3 (attached to Bishop Estate Mot. Partial Summ. J. filed 2/14/92). Thus, the court finds that the administrative adjustment provision is largely irrelevant.

Accordingly, the court finds that Ordinance 91-96 violates the Fifth Amendment's Takings Clause because it does not provide for consideration of individual factors which may affect the value of a particular parcel of real property at the time of renegotiation. Furthermore, Ordinance 91-96 is infirm because it does not account for situations in which the renegotiated lease rent formula does not provide the lessor with a fair rate of return. In other words, there is no meaningful mechanism for obtaining relief when the lease rent formula results in a confiscatory rate.

c. *Ground lease premium*

In addition to Ordinance 91-96's lack of individualized consideration, Bishop Estate also argues that the ordinance fails to substantially advance its public purpose because it allows a lessee to monetize a below-market rate renegotiated lease rent at the expense of the lessor. Pursuant to Ordinance 91-96, if an owner-occupant transfers his leasehold interest in a residential condominium unit to another person intending to be an owner-occupant, the renegotiated lease rent is assigned and applicable to the

new owner-occupant.[14] Ord. 91-96 § 1.10. Bishop Estate contends that this provision allows an owner-occupant with a below-market rate renegotiated lease rent to sell his condominium and receive a monetary premium for the below-market rate lease rent.

In the mobile home rent control cases discussed above, the various ordinances all contained provisions which allowed tenants to transfer their rights to below-market rental rates to other buyers. *See Yee v. Escondido,* —— U.S. ——, 112 S.Ct. 1522, 1528-30, 118 L.Ed.2d 153 (1992); *Azul Pacifico, Inc. v. City of Los Angeles,* 948 F.2d 575, 581-82 (9th Cir.1991), *opinion withdrawn on other grounds,* 973 F.2d 704 (9th Cir.1992); *Pinewood Estates v. Barnegat Township Leveling Bd.,* 898 F.2d 347 (3d Cir.1990); *Hall v. City of Santa Barbara,* 833 F.2d 1270, 1278-80 (9th Cir.1986), *cert. denied,* 485 U.S. 940, 108 S.Ct. 1120, 99 L.Ed.2d 281 (1988). The courts in those cases uniformly recognized the constitutional concerns inherent in such schemes.

The problem with rent control plans which permit the tenant to transfer his right to below-market rates is the tenant's ability to command a premium for his right. *See generally,* Werner Z. Hirsch & Joel G. Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol,* 35 UCLA L.Rev. 399 (1988). In the mobile home cases, the premium represented the right to occupy the mobile home pad at a below-market rate. In the present case, the premium would represent the lessee's right to a below-market rate renegotiated ground lease rent. Thus, the

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[14] The court notes that the renegotiated lease rent is not assignable if an owner-occupant transfers his leasehold interest to a new owner who does not intend to be an owner-occupant. Ord. 91-96 § 1.13. Nonetheless, this fact does not alleviate the problems associated with assignments to new owners who do intend to be owner-occupants.

right to receive the premium between the rent-controlled rate and the market rate is transferred from the landlord/lessor to the tenant/lessee; this interest is worth the capitalized value of the difference between market rent and the controlled rent.

In *Hall*, the Ninth Circuit recognized the numerous Supreme Court cases which have upheld rent control laws. 833 F.2d at 1278 & nn. 19-20. The court commented, however, that none of the cases upholding rent control involved a situation in which the tenant could transfer his right to below-market rental rate to others in order to reap a monetary windfall. *Id.* The court emphasized:

> This is not a minor difference; it is crucial. The fact that the tenant can sell his interest to third parties drastically affects the economic realities of the landlord/tenant relationship. The typical rent control statute modifies the landlord/tenant relationship somewhat to protect tenants from perceived evils of the free-enterprise system. . . .
>
> That tenants normally cannot sell their rights in rent controlled property provides important safeguards for landlords. . . . If [tenants] are denied the right to cash out, tenants can enjoy the benefits of rent control only so long as they remain tenants, not beyond. When the premises become vacant, the landlord is able to reassert a measure of control over the property.

Id. at 1279.

The Third Circuit also adopted the reasoning of *Hall* in *Pinewood Estates*. In the spring of 1992, the Supreme Court commented on the premium issue in *Yee v. Escondido*, —— U.S. —— 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992).[15] The Supreme Court in *Yee* indicated that

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[15] As mentioned in the physical taking discussion above, the Supreme Court in *Yee* rejected the notion set forth in *Hall* and

while the rent control premium issue was not relevant to a physical taking argument, the premium factor was likely relevant with respect to a regulatory taking analysis.[16] —— U.S. at ——, ——, 112 S.Ct. at 1528, 1530. In particular the court explained:

> **[The mobile home park owners] are correct in citing the existence of this premium as a difference between the alleged effect of the Escondido ordinance and that of an ordinary apartment rent control statute.** Most apartment tenants do not sell anything to their successors (and are often prohibited from charging "key money"), so a typical rent control statute will transfer wealth from the landlord to the incumbent tenant and all future tenants. By contrast, [the mobile home park owners] contend that the Escondido ordinance transfers wealth only to the incumbent mobile home owner. **This effect might have some bearing on whether the ordinance causes a regulatory taking, as it may shed some light on whether there is a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance.** . . . But it has nothing to do with whether the ordinance causes a *physical* taking.

112 S.Ct. at 1530 (bold added).

In the present case, the court finds that the principles relating to "premiums" in the mobile home context are applicable to the condominium market.[17] Like moblie

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Pinewood Estates that the mobile home rent control laws effected a physical taking. 112 S.Ct. at 1528-31.

[16] The Court declined to fully address the regulatory taking claim because that issue was not included in the question on which certiorari was granted. 112 S.Ct. at 1531-34.

[17] While Ordinance 91-96 has not yet been in operation, the court notes that the "premium" argument is ripe because this case involves a facial challenge to the ordinance. In *Yee*, the Supreme Court held that an analogous facial challenge was ripe. 112 S.Ct. at 1532.

home park tenants, owner-occupants of leasehold condominiums own their housing unit, the condominium itself, but lease the underlying land. Moreover, the below-market rate lease rent which applies to the mobile home tenants and leasehold condominium owner-occupants is transferable to subsequent purchaser of the mobile home pad or condominium. With respect to both mobile homes and condominiums, the availability of a below-market rate lease rent necessarily increases the value of the subject housing unit, thereby allowing a seller to command a premium upon the sale of the housing unit. This transfer of wealth problem is generally not a concern in the area of apartment rent control because apartment rentals do not involve the ownership component present in mobile homes or condominiums.[18]

The court finds that Ordinance 91-96 enables an owner-occupant to charge a premium, in connection with the sale of a leasehold condominium with a below-market rate renegotiated lease rent, thereby operating to transfer value from the lessor to the lessee/seller. In light of the reasoning of the aforementioned moblie home park cases, and the analogous effects of the mobile home park laws regarding rent control and Ordinance 91-96, the court finds that the availability of the premium and the resulting transfer of wealth from the lessor to the lessee under Ordinance 91-96 violates the Taking Clause.[19]

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[18] The Hirschs elaborate:

> If a rent control ordinance [pertaining to apartments] allowed alienation of a tenant's rights and benefits under rent control, presumably apartment tenants could gain a benefit similar to the placement value given to mobile home park tenants. A "key money" (money spent to obtain a rent-controlled apartment, usually illegally) feature to apartment rent controls might give the tenant a similar ability to monetize the benefits of rent control.

Hirsch & Hirsch, *supra*, at 425 n. 87.

[19] As the court finds Ordinance 91-96 to be unconstitutional under the Taking Clause, it need not address Bishop Estate's due

II. ORDINANCE 91-95

A. *Background*

Ordinance 91-95 involves a mechanism for the transfer of the fee simple interest of leasehold property from condominium lessors to condominium lessees in Honolulu. In the "Findings and Purpose" section of Ordinance 91-95, the City found that there are approximately 16,000-17,000 residential condominium, cooperative and planned development units on leased land on Oahu.[20] Ord. 91-95 § 1. The City further found that the owners of such leased land had generally refused to sell proportionate shares in the land underlying such units. *Id.* As a result of this practice, the City determined that there exists "a serious shortage of fee simple residential condominium land, cooperative housing unit land and planned development land and [] an artificial inflation of the value of such land on Oahu." *Id.*

Accordingly, the City concluded that owners of condominiums on leased land should be able to acquire the proportionate share of leased land underlying their units at a fair and reasonable price. *Id.* In order to accomplish this objective, the City decided to use its eminent domain power to condemn the fee simple title to the land underlying condominiums, pay just compensation to the lessors/owners of such land, and sell the land to the condominium owners. *Id.*

The City Department of Housing and Community Development ("Department") is charged with administer-

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process (Counts III and IV), equal protection (Count V), contracts clause (Count VI), or state law claims (Counts X and XII) claims regarding Ordinance 91-96.

[20] For the sake of simplicity, the court will refer to all condominium apartments, cooperative housing units, and planned development units covered by Ordinance 91-95 as "condominiums," unless otherwise indicated. While the court recognizes the legal distinctions between these forms of apartment ownership, such distinctions are not relevant to the issues at hand.

ing, enacting appropriate rules, and enforcing Ordinance 91-95. Ord. 91-95 §§ 1.7, 1.8. Article 2 of Ordinance 91-95 governs the condemnation of condominium development leaseholds.[21] The condemnation procedures are triggered once at least twenty-five of the condominium owners within the development or the owners of 50% of the condominium units, whichever is less, apply to the Department to purchase the leased fee interest. *Id.* § 2.2(a)(1). After such an application, the Department must publish notice and hold a public hearing to determine whether the acquisition of the leased fee interest will effectuate the public purposes of the ordinance. *Id.* at § 2.2(a)(2).

Within twelve months after the Department has designated a condominium development, or portion thereof, for acquisition, the Department must institute eminent domain proceedings unless the parties voluntarily agree to a sale of the property. Ord. 91-95 § 5.2. The compensation to be paid for the acquired property shall be the fair market value of the leased fee interest determined as of the date of the summons of the complaint in the eminent domain proceeding. *Id.* at 5.3.

After the City has acquired the subject land, authorized condominium lessees must purchase the underlying land within sixty days of acquisition. *Id.* § 2.3. In order to be eligible to buy the leased land, a purchaser must satisfy a list of seven requirements. *Id.* § 2.4.

B. *Takings Clause (Count VII)*[22]

1. Hawaii Housing Authority v. Midkiff

As Ordinance 91-95 involves leasehold conversion via eminent domain, the court notes that this general issue has

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[21] Articles 3 and 4 contain similar provisions relating to cooperative housing development leaseholds and residential planned development leaseholds, respectively.

[22] The court notes that much of the law regarding the Takings Clause has been discussed above with respect to Ordinance 91-96. Accordingly, the court will not repeat the general discussion of Takings Clause law.

been thoroughly addressed by the Supreme Court in a very similar case, *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984). In that case, the plaintiffs challenged the State of Hawaii's Land Reform Act of 1967 which created a mechanism for condemning residential lots occupied by single-family homes on which the underlying land was leased, and transferring ownership of the condemned fees simple to the lessees. As Ordinance 91-95 is modeled after the Land Reform Act, many of the procedural aspects of the Land Reform Act are similar, if not identical, to the provisions of Ordinance 91-95 as explained above.[23]

The Supreme Court in *Midkiff* rejected the plaintiffs' arguments that the Land Reform Act violated the "public use" requirement of the Fifth Amendment's Takings Clause. The Court explained that its role in reviewing the legislature's judgment regarding public use is extremely narrow. 467 U.S. at 240, 104 S.Ct. at 2329 (citing *Berman v. Parker*, 348 U.S. 26, 32, 75 S.Ct. 98, 102, 99

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[23] The Supreme Court explained the method of condemnation under the Land Reform Act as follows:

> Under the Act's condemnation scheme, tenants living on single-family residential lots within developmental tracts at least five acres in size are entitled to ask the [HHA] to condemn the property on which they live. When 25 eligible tenants, or tenants on half the lots in the tract, whichever is less, file appropriate applications, the Act authorizes HHA to hold a public hearing to determine whether the acquisition by the State of all or part of the tract will "effectuate the public purposes" of the Act. If HHA finds that these public purposes will be served, it is authorized to designate some or all of the lots in the tract for acquisition. It then acquires, at prices set either by condemnation trial or by negotiation between lessors and lessees, the former fee owners' full "right, title, and interest" in the land.
>
> After compensation has been set, HHA may sell the land titles to tenants who have applied for fee simple ownership.

467 U.S. at 233-34, 104 S.Ct. at 2325-26 (citations and footnotes omitted).

L.Ed. 27 (1954)). The Court indicated that it would defer to the legislature's public use determination unless the use involves an "impossibility" or is "palpably without reasonable foundation." *Id.* 467 U.S. at 240-41, 104 S.Ct. at 2329-30. The Court further noted that "where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause." *Id.* at 241, 104 S.Ct. at 2329.

Accordingly, the Supreme Court upheld the Land Reform Act. The Court recognized that the Hawaii Legislature had determined that a land oligopoly existed and that such concentration was the cause of several types of local problems. *Id.* at 241-42, 104 S.Ct. at 2329-30. The Court reasoned that regulation of an "oligopoly and the evils associated with it is a classic exercise of a State's police powers." *Id.* at 242, 104 S.Ct. at 2330.

The Court further found that the Land Reform Act's approach to correcting the land oligopoly problem was not irrational. *Id.* The Court elaborated:

> [The Land Reform Act,] like any other, may not be successful in achieving its intended goals. But "whether *in fact* the provision will accomplish its objectives is not the question: the [constitutional requirement] is satisfied if . . . the . . . [state] Legislature *rationally could have believed* that the [Act] would promote its objective." When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socio-economic legislation—are not to be carried out in the federal courts. Redistribution of fees simple to correct deficiencies in the maket determined by the state legislature to be attributable to land oligopoly is a rational exercise of the eminent domain power. Therefore, the Hawaii

statute must pass the scrutiny of the Public Use Clause.

467 U.S. at 242-43, 104 S.Ct. at 2330.

2. The Present Case

In light of the Supreme Court's holding and reasoning in *Midkiff* as well as the similarity between the Land Reform Act and Ordinance 91-95, the court finds little merit to Bishop Estate's taking argument regarding Ordinance 91-95. Bishop Estate argues that the public purpose of Ordinance 91-95 is without reasonable foundation. In particular, Bishop Estate maintains that the ordinance is based on the incorrect assumption that a concentration of land ownership currently exists with respect to land leased for condominiums which is similar to the oligopoly which justified the Land Reform Act in the single-family home context. Bishop Estate contends that there is no concentration of land ownership in relation to leased land underlying condominium projects.

The court finds no merit to this argument. The Supreme Court in *Midkiff* repeatedly emphasized the substantial deference which should be accorded to the relevant legislative body in the area of public use. 467 U.S. at 239-43, 104 S.Ct. at 2328-31. In the present case, the City Council determined that ownership of land beneath residential condominium projects is concentrated in the hands of owners who have refused to sell proportionate shares in their fee simple titles to lessees residing in the condominium units. Ord. 91-95 § 1. Thus, the City Council's primary concern was apparently the inability of the owners of leasehold condominiums to purchase proportionate shares of the underlying fee simple title. While the current concentration of land ownership with respect to leasehold condominiums may not be as drastic as the land oligopoly which prompted the Land Reform Act,[24] this contention

[24] Nonetheless, the court notes that Bishop Estate's own filings reveal that in 1987 the land underlying 45% of the condominium

does not undermine the City's determination that permitting leasehold condominium owners to purchase the underlying property serves a legitimate public purpose.

Bishop Estate also argues that Ordinance 91-95 fails to provide lessors with just compensation. It claims that they are entitled to severance damages for the partial condemnation of their leased land. It also contends that Ordinance 91-95 fails to exclude the effects that Ordinance 91-96 has on the valuation of the leased fees.

Bishop Estate's argument regarding just compensation is untenable. As section 5.3 of Ordinance 91-95 provides for payment of compensation equivalent to "the current fair market value of the leased fee interest," the ordinance clearly comports with the constitutional requirements for just compensation. *See United States v. Reynolds*, 397 U.S. 14, 16, 90 S.Ct. 803, 805, 25 L.Ed.2d 12 (1970).[25] Any arguments as to the proper manner of calculating current fair market value and the appropriate factors to be considered are premature in this facial challenge at this

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projects in Hawaii was owned by only 51 lessors. Bishop Estate Mot. Summ. J. filed 2/14/92, Ex. CC, at ii. Furthermore, at the time Ordinance 91-95 was enacted, Bishop Estate alone owned the fee simple interest under approximately 12,500 of the leasehold condominium units. Bishop Estate Mem. Opp. filed 6/29/92, at 8.

[25] In *Reynolds*, the Supreme Court explained:

> And "just compensation" means the full monetary equivalent of the property taken. The owner is to be put in the same position monetarily as he would have occupied if his property had not been taken. In enforcing the constitutional mandate, the Court at an early date adopted the concept of market value: *the owner is entitled to the fair market value of the property at the time of the taking.*

397 U.S. at 16, 90 S.Ct. at 805 (footnotes omitted) (emphasis added).

point in time.[26] *Southern Pacific v. City of Los Angeles,* 922 F.2d 498, 505-07 (9th Cir.1990) (facial takings challenge alleging denial of just compensation is not ripe unless the plaintiff has sought compensation through the available procedures), *cert. denied,* —— U.S. ——, 112 S.Ct. 382, 116 L.Ed.2d 333 (1991); *see also Richardson I,* 759 F.Supp. at 1481. The City Department of Housing and Community Development has yet to enact the necessary rules to effectuate Ordinance 91-95. More importantly, the state courts have not had an opportunity to interpret and apply the compensation provisions of Ordinance 91-95. In sum, Ordinance 91-95 states that landowners shall be paid fair market value; accordingly, in the absence of evidence to the contrary, this court assumes that all factors necessary to comply with constitutional requirements will be considered.[27]

C. *Substantive Due Process (Count VIII)*

In order to prevail on its substantive due process claim, Bishop Estate must establish that Ordinance 91-95 is "arbitrary and irrational." *Del Monte Dunes v. City of Monterey,* 920 F.2d 1496, 1508 (9th Cir.1990). Bishop Estate claims that Ordinance 91-95 does not have a legitimate government purpose and that the ordinance is not

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[26] The court notes that Bishop Estate's argument regarding just compensation is distinct from the reasonable rate of return inquiry associated with Ordinance 91-96. With respect to Ordinance 91-96, the court had to determine whether a taking existed. One of the factors in determining whether a taking has occurred is whether the landowner will still be able to receive a fair rate of return on his property. In contrast, as Ordinance 91-95 involves complete condemnation, it necessarily involves a taking. Thus, the pertinent question is whether the landowner receives "just compensation" for the taking.

[27] The Ninth Circuit has held that a determination of "fair market value" may include severance damages. *United States v. 50.50 Acres of Land,* 931 F.2d 1349, 1358 (9th Cir.1991); *see generally Georgia-Pacific Corp. v. United States,* 226 Ct.Cl. 95, 640 F.2d 328 (1980).

rationally related to the alleged legislative purpose. The court finds no merit to Bishop Estate's substantive due process claim.

This court rejected these same type of arguments with respect to Bishop Estate's taking claim discussed above. The court further notes that a plaintiff has an extraordinarily high burden to carry in order to demonstrate that a legislative enactment is arbitrary and irrational under the due process clause. *See Del Monte Dunes*, 920 F.2d at 1508. Moreover, courts should give substantial deference to a legislature's determination of a public use or purpose as well as the legislative means for carrying out the purpose. *Midkiff*, 467 U.S. at 239-243, 104 S.Ct. at 2328-31. In *Midkiff*, the Supreme Court specifically recognized that the use of the government's eminent domain power to effect lease-to-fee conversion is a rational response to serious housing problems. *Id.* at 242-43, 104 S.Ct. at 2330-31. The Court in *Midkiff* stated that it found no merit to the plaintiffs' due process claim and it disposed of the matter in two sentences in a footnote. *Id.* at 243 n. 6, 104 S.Ct. at 2330 n. 6.

D. *Equal Protection (Count IX)*

Generally, equal protection challenges are evaluated under rational-basis scrutiny to see whether the legislation at issue is irrational or wholly arbitrary. *Conti v. City of Fremont*, 919 F.2d 1385, 1389 (9th Cir.1990). Classifications based upon race, however, are presumptively invalid. *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272, 99 S.Ct. 2282, 2292, 60 L.Ed.2d 870 (1979). Nonetheless, the Supreme Court has made clear that "even if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a *discriminatory purpose.*" *Feeney*, 442 U.S. at 272, 99 S.Ct. at 2292 (emphasis added) (citing *Washington v.*

Davis, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), and *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977)).

Thus, if the official action in question is race-neutral on its face, a plaintiff asserting an equal protection claim based upon race must prove the existence of racially discriminatory intent or purpose in order to prevail. *Arlington Heights*, 429 U.S. at 265, 97 S.Ct. at 563. The Supreme Court has cautioned that discriminatory intent or purpose requires more than simply intent as volition or awareness of consequences. *Feeney*, 442 U.S. at 279, 99 S.Ct. at 2296. A plaintiff must demonstrate that the legislation at issue was enacted "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable [racial] group." *Id.; see also Stop H-3 Ass'n v. Dole*, 870 F.2d 1419, 1431-32 (9th Cir.1989).

For the purposes of the present case, a brief examination of *Feeney* is instructive. In that case, female plaintiffs challenged a Massachusetts statute which gave veterans a preference for state civil service jobs. The plaintiffs alleged that the law violated their rights under the Fourteenth Amendment's Equal Protection Clause because the statute operated overwhelmingly to the advantage of men since over 98% of veterans were male.

Initially, the Supreme Court noted that the statute was gender-neutral on its face as it distinguished only between veterans and non-veterans, not men and women. 442 U.S. at 274, 99 S.Ct. at 2293. The Court reasoned that the law could not be rationally explained on the basis of gender:

> Veteran status is not uniquely male. Although few women benefit from the preference the nonveteran class is not substantially all female. To the contrary, significant numbers of nonveterans—male as well as

> female—are placed at a disadvantage. Too many men are affected by [the veterans preference law], to permit the inference that the statute is but a pretext for preferring men over women.

Id. at 275, 99 S.Ct. at 2294. In addition, the court noted that the statute's unfortunate impact upon women was easily explained, in a gender-neutral manner, by the legislature's completely legitimate goal of aiding veterans. *Id.*

Furthermore, the Supreme Court in *Feeney* rejected the plaintiffs' allegations of gender-based discriminatory purpose. 442 U.S. at 276-80, 99 S.Ct. at 2294-97. Asserting that a person intends the natural and forseeable consequences of his voluntary actions, the plaintiffs argued that the Massachusetts legislature must have intended to discriminate against women because the statute foreseeably and inevitably operated to the great disadvantage of women. *Id.* at 278, 99 S.Ct. at 2295. While the Court recognized the statute's foreseeable adverse consequences to women, the Court emphasized that there was no evidence that the preference for veterans was devised to harm women. *Id.* at 279, 99 S.Ct. at 2296. In essence, the purpose of the statute was clearly to help veterans, not to discriminate against women. *Id.* at 279-80, 99 S.Ct. at 2296-97.

In the present case, Bishop Estate argues that Ordinance 91-95 intentionally discriminates against Native Hawaiians. It contends that the discrimination is demonstrated in part by the fact that Bishop Estate and Liliuokalani Trust, two of the top five landowners affected by Ordinance 91-95, were created specifically for the benefit of Native Hawaiians.[28] Bishop Estate Mem.Opp. filed 6/29/92, at 7.

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[28] More specifically, Bishop Estate argues that the alleged discriminatory purpose of Ordinance 91-95 against Native Hawaiians is evidenced by: disproportionate impact, history of public land policy, erroneous findings of fact, procedural irregularities in enacting the ordinance, the City's knowledge of the ordinance's impact,

However, Bishop Estate's equal protection arguments exhibit the same type of flaws as that of the plaintiffs' claims in *Feeney*.

Ordinance 91-95 is undoubtedly racially neutral on its face. Ordinance 91-95 applies to residential leasehold condominium lessors and lessees irrespective of the race or ethnic background of the affected parties. The impact of the ordinance is shared by all lessors, many of which, if not the majority, are not Native Hawaiian. Analagous to *Feeney*, too many non-Native Hawaiian lease fee owners are affected by Ordinance 91-95 to permit the inference that the statute is but a pretext for preferring non-Native Hawaiians over Native Hawaiians.

The present case is also similar to *Feeney* in that the plaintiffs have failed to establish any discriminatory intent or purpose. Like the legislators in *Feeney*, the drafters of Ordinance 91-95 were likely aware of the effect that the ordinance would have on entities, such as Bishop Estate, which are connected with Native Hawaiian ethnicity. However, in this case as well as *Feeney*, a perfectly legitimate government purpose explains the impetus of the legislation. Whereas *Feeney* involved aid to veterans, Ordinance 91-95 was enacted in response to the critical problems in the Honolulu housing market, in particular leasehold condominiums. Thus, the court finds that the City has a legitimate public purpose for enacting Ordinance 91-95 and there is no credible evidence to support the notion that Ordinance 91-95 is but a pretext for discriminating against Native Hawaiians.

E. *State Constitutional Claims (Count XI)*

In Count XI, Bishop Estate claims that Ordinance 91-95 violates its rights under the takings, due process, and

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and the official action taken to enact the ordinance. Bishop Estate Mem.Opp. filed 6/29/92, at 5-30.

equal protection clauses of the Hawaii State Constitution. While the Hawaii State Constitution is generally modeled after the United States Constitution, the scope of its protections are not necessarily the same. *Hawaii Housing Authority v. Lyman*, 68 Haw. 55, 704 P.2d 888, 896 (1985). However, the legal analysis of Bishop Estate's claims under the aforementioned state constitutional provisions is essentially the same as the inquiry under the corresponding sections of the United States Constitution.[29] *See, e.g. id.* 704 P.2d at 897 (takings clause); *State v. Cotton*, 55 Haw. 148, 516 P.2d 715, 719 (1973) (due process clause); *Estate of Coates v. Pacific Eng'g*, 71 Haw. 358, 791 P.2d 1257, 1260 (1990) (equal protection clause). Accordingly, for the same reasons that this court rejected Bishop Estate's federal constitutional claims above, the court similarly finds its state constitutional arguments unpersuasive.

F. *State Statutory Claims (Count XIII)*

In Count XIII, Bishop Estate contends that Ordinance 91-95 is preempted by various Hawaii state statutes. In particular, it claims that Ordinance 91-95 is preempted by the comprehensive provisions set forth in Hawaii Revised Statutes chapters 101 (eminent domain), 516 (residential leasehold condominiums and cooperatives), 519 (real property leases), 514A (condominiums), and 421H (cooperative housing corporations). For the reasons set forth below, the court certifies the preemption question to the Hawaii Supreme Court.[30]

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[29] Moreover, the court notes that all of the parties have relied on the same arguments to support their positions on the state constitutional claims as they did with respect to the federal constitutional claims.

[30] The court need not certify the state law questions regarding Bishop Estate's claims under the Hawaii State Constitution because there is sufficient state law to enable this court to make an informed decision on these issues. Moreover, Rule 13(a) of the Hawaii Rules

The United States Supreme Court has consistently approved of the use of certified questions to state supreme courts when a federal court case involves an important question of state law which is both unclear under state legal precedent and would be determinative in the instant case. *Virginia v. American Booksellers Ass'n,* 484 U.S. 383, 393-98, 108 S.Ct. 636, 643-46, 98 L.Ed.2d 782 (1988); *Bellotti v. Baird,* 428 U.S. 132, 150-52, 96 S.Ct. 2857, 2867-68, 49 L.Ed.2d 844 (1976); *Lehman Bros. v. Schein,* 416 U.S. 386, 389-92, 94 S.Ct. 1741, 1743-45, 40 L.Ed.2d 215 (1974); *Clay v. Sun Ins. Office,* 363 U.S. 207, 212, 80 S.Ct. 1222, 1225, 4 L.Ed.2d 1170 (1960).[31] In *Lehman,* the Supreme Court explained:

> [Use of state certification procedures] does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism. Its use in a given case rests in the sound discretion of the federal court.

416 U.S. at 391, 94 S.Ct. at 1744 (footnote omitted).

While federal courts should not abdicate their duty to decide issues properly before them by routinely certifying questions to state supreme courts, certification under appropriate circumstances can result in significant conservation of the litigants' time and money as well as judicial resources. The Ninth Circuit Court of Appeals has not hesitated to certify questions to state supreme courts when such questions involved important issues of unsettled state law which were controlling in the federal case.[32]

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of Appellate Procedure permits certification only when there is no controlling precedent in the Hawaii judicial decisions.

[31] Most of the aforementioned cases as well as the succeeding cases regarding certification have extensive subsequent cases histories in light of the certified questions. As these cases are mentioned only as examples of certification and not for their substantive holdings, the court will omit the subsequent case histories.

[32] *See, e.g., Alaska Airlines v. United Airlines,* 902 F.2d 1400, 1403-05 (9th Cir.1990); *Morrell Constr. v. Home Ins. Co.,* 899 F.2d

District courts have similarly utilized the certification process. *See, e.g., Burdick v. Takushi,* 737 F.Supp. 582 (D.Haw.1990) (on remand following Ninth Circuit's reversal, district court certified three questions with respect to Hawaii election laws and write-in votes). The decision whether to certify a state law question to the state supreme court rests in the sound discretion of the federal district court. *Louie v. United States,* 776 F.2d 819, 824 (9th Cir.1985).

In order for a federal court to be able to certify a question to a state supreme court, the state court must provide a specific procedure for receiving such questions. The Hawaii Supreme Court has authorized certified questions in Rule 13 of the Hawaii Rules of Appellate Procedure. Pursuant to Rule 13(a), a federal district court may certify a question to the Hawaii Supreme Court when such question (1) concerns Hawaii law which is (2) determinative of the cause and (3) there is no clear controlling precedent in the Hawaii judicial decisions.

In the present case, the court finds that Count XIII involves issues of state law which are determinative of the validity of Ordinance 91-95. The court further finds that the there is no clear controlling precedent in the Hawaii judicial decisions which disposes of these state law issues. In particular, this court finds conflicting authority as to whether Hawaii Revised Statutes chapter 101, which governs eminent domain procedures, preempts Ordinance 91-95.

On the other hand, the Hawaii legislature enacted the Land Reform Act which has eminent domain procedures

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875 (9th Cir.1990); *Kunz v. Utah Power & Light Co.,* 871 F.2d 85, 87-88 (9th Cir.1989); *Torres v. Goodyear Tire & Rubber Co.,* 867 F.2d 1234, 1237-39 (9th Cir.1989); *Toner for Toner v. Lederle Labs.,* 779 F.2d 1429, 1432-34 (9th Cir.1986); *Aetna Ins. Co. v. Craftwall of Idaho,* 757 F.2d 1030, 1034 (9th Cir.1985); *Meckert v. Transamerica Ins. Co.,* 742 F.2d 505, 506-07 (9th Cir.1984).

nearly identical to those of Ordinance 91-95. Thus, the Hawaii legislature has specifically authorized certain types of eminent domain procedures which conflict with the general provisions of chapter 101. Furthermore, the State Attorney General has opined that Ordinance 91-95 is not preempted by state law.[33] On the other hand, relevant Hawaii statutory law seems to indicate that the City must utilize the eminent domain procedures in chapter 101 which appear to conflict with the procedures in Ordinance 91-95.

In addition the preemptory issues raised here implicate a broader question regarding the various county's authority to enact legislation in areas occupied, or at least partially occupied, by state law. While the Supreme Court of Hawaii has in the past addressed this question, as this case illustrates there remains significant room for interpretation and thus confusion. This question is of significant importance to both the counties and the state and transcends the boundaries of this case. Because this involves a pure question of state law and policy, in the final analysis it must be decided by the Hawaii Supreme Court.

This court is fully aware of the fact that certification in this case will cause some initial delay while the Hawaii Supreme Court addresses the certified question. Nonetheless, if this court were not to certify the state law preemption question, the court is confident that the Ninth Circuit Court of Appeals would itself order such certification in light of the controlling nature of the important, unsettled state law and policy issues. The court notes that the Ninth

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[33] *See* Opinion of the Attorney General of the State of Hawaii dated October 4, 1991, at 1. (Bishop Estate Mot. Partial Summ.J. filed 2/14/92, Ex. R). Nonetheless, the Attorney General did not specifically address the issue of preemption relating to chapter 101. To the contrary, the Attorney General seemed to indicate that the City must utilize its eminent domain power pursuant to the procedures provided in chapter 101. *Id.* at 2.

Circuit Court of Appeals has often certified questions to the Hawaii Supreme Court.[34]

Leaving the certification to the court of appeals would only cause further delay as well as undue confusion and uncertainty in the interim while the parties consider whether to act upon this court's decision on these purely state law issues in light of the pending appeal. Therefore, while certification will result in some initial delay, it will obviate a much greater delay and substantial confusion in the likely event the Ninth Circuit were to certify the preemption question while the case was on appeal.

Upon careful review of the relevant state law and the underlying state policy implications involved, the court finds that the purely state law preemption issue would be best answered in the first instance by the Hawaii Supreme Court. Accordingly, the court will certify this question to the Hawaii Supreme Court under Rule 13 of the Hawaii Rules of Appellate Procedure, and retain jurisdiction pending a determination by the Hawaii Supreme Court.

CONCLUSION

In *Richardson I,* this court held that Ordinance 91-96's predecessor statute, Ordinance 90-95, was unconstitutional for a number of reasons. Subsequent to that decision, the City, in enacting Ordinance 91-96, made an attempt to remedy the problems with Ordinance 90-95. While the

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[34] *See, e.g., Smith v. Cutter Biological,* 911 F.2d 374 (9th Cir. 1990) (Ninth Circuit certified three questions regarding the Hawaii Blood Shield Law); *Graulty v. Bank of Hawaii,* 856 F.2d 78 (9th Cir.1988) (Ninth Circuit certified question pertaining to Hawaii Uniform Fiduciaries Act); *In re Asbestos Cases,* 829 F.2d 907 (9th Cir.1987) (Ninth Circuit certified question relating to Hawaii products liability law); *United States v. Allstate Ins. Co.,* 825 F.2d 243 (9th Cir.1987) (Ninth Circuit certified question regarding the government's ability to recover medical care costs under Hawaii law); *Kinoshita v. Canadian Pacific Airlines,* 803 F.2d 471 (9th Cir.1986) (Ninth Circuit certified question of Hawaii contract law); *Robinson v. Ariyoshi,* 753 F.2d 1468 (9th Cir.1985) (Ninth Circuit certified six questions regarding Hawaii water law issues).

City managed to correct some of the constitutional infirmities of Ordinance 90-95, it failed to appropriately address other defects. For the reasons stated above, the court GRANTS Bishop Estate's motion for partial summary judgment with respect to Ordinance 91-96 finding the ordinance unconstitutional for the reasons stated herein and DENIES the City's and the HALE Coalition's motions for partial summary judgment regarding Ordinance 91-96.

With respect to Ordinance 91-95, this court has found the ordinance to be in compliance with the relevant provisions and standards of the United States Constitution and the Constitution of the State of Hawaii. Therefore, the court GRANTS the City's and HALE Coalition's motions for partial summary judgment with respect to the federal and state constitutional claims pertaining to Ordinance 91-95 finding the ordinance in compliance with federal and state constitutional standards and DENIES Bishop Estate's motion for partial summary judgment on those same claims.

The court also CERTIFIES to the Supreme Court of Hawaii the following question:

> According to Hawaii state law, is Ordinance 91-95 preempted by Hawaii Revised Statutes chapters 101, 516, 516D, 519, 514A, or 421H?

The parties are ordered to submit the appropriate certificate in accordance with this court's separate order regarding certification.

IT IS SO ORDERED.

APPENDIX C

UNITED STATES DISTRICT COURT
D. HAWAII

Civ. No. 92-00372 HMF

SMALL LANDOWNERS OF OAHU,
a Hawaii nonprofit corporation,
Plaintiff,

v.

CITY AND COUNTY OF HONOLULU,
a Hawaii municipal corporation,
Defendant.

Sept. 16, 1993

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

FONG, District Judge.

INTRODUCTION

On August 30, 1993, the court heard oral argument on cross motions for summary judgment filed by Plaintiff Small Landowners of Oahu ("Small Landowners") and Defendant City and County of Honolulu (the "City").

The subject of this lawsuit is the constitutionality of Ordinance 91-95, a condominium lease-to-fee ordinance similar to the single family residence lease-to-fee statute upheld by the United States Supreme Court in *Hawaii*

Housing Authority v. Midkiff, 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984).

In a case brought by the Bishop Estate, Judge David Ezra of this court had previously held that Ordinance 91-95 was constitutional under both the United States and Hawaii constitutions. *Richardson, et al., v. City and County of Honolulu (Richardson II)*, 802 F.Supp. 326 (D.Haw.1992), Exh. A to the City's Motion. Before a ruling on the summary judgment motions, Small Landowners unsuccessfully attempted to intervene in that case. *Richardson II*, Order of July 6, 1992, Exh. C to City's Motion.

BACKGROUND

Ordinance 91-95 was enacted on December 8, 1991.

In *Richardson II*, the court explained the operation of Ordinance 91-95 as follows:

> Ordinance 91-95 involves a mechanism for the transfer of the fee simple interest of leasehold property from condominium lessors to condominium lessees in Honolulu. In the "Findings and Purpose" section of Ordinance 91-95, the City found that there are approximately 16,000-17,000 residential condominium, cooperative and planned development units on leased land on Oahu.[1] Ord. 91-95 § 1. The City further found that the owners of such leased land had generally refused to sell proportionate shares in the land underlying such units. *Id.* As a result of this practice, the City determined that there exists "a serious shortage of fee simple residential condominium land, cooperative housing unit land

[1] For the sake of simplicity, the court will refer to all condominium apartments, cooperative housing units, and planned development units covered by Ordinance 91-95 as "condominiums," unless otherwise indicated. While the court recognizes the legal distinctions between these forms of apartment ownership, such distinctions are not relevant to the issues at hand.

and planned development land and [] an artificial inflation of the value of such land on Oahu." *Id.*

Accordingly, the City concluded that owners of condominiums on leased land should be able to acquire the proportionate share of leased land underlying their units at a fair and reasonable price. *Id.* In order to accomplish this objective, the City decided to use its eminent domain power to condemn the fee simple title to the land underlying condominiums, pay just compensation to the lessors/owners of such land, and sell the land to the condominium owners. *Id.*

The City Department of Housing and Community Development ("Department") is charged with administering, enacting appropriate rules, and enforcing Ordinance 91-95. Ord. 91-95 §§ 1.7, 1.8. Article 2 of Ordinance 91-95 governs the condemnation of condominium development leaseholds.[2] The condemnation procedures are triggered once at least twenty-five of the condominium owners within the development or the owners of 50% of the condominium units, whichever is less, apply to the Department to purchase the leased fee interest. *Id.* § 2.2 (a)(1). After such an application, the Department must publish notice and hold a public hearing to determine whether the acquisition of the leased fee interest will effectuate the public purposes of the ordinance. *Id.* § 2.2(a)(2).

Within twelve months after the Department has designated a condominium development, or portion thereof, for acquisition, the Department must institute eminent domain proceedings unless the parties voluntarily agree to a sale of the property. Ord. 91-

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[2] Articles 3 and 4 contain similar provisions relating to cooperative housing development leaseholds and residential planned development leaseholds, respectively.

> 95 § 5.2. The compensation to be paid for the acquired property shall be the fair market value of the leased fee interest determined as of the date of the summons of the complaint in the eminent domain proceeding. *Id.* § 5.3.
>
> After the City has acquired the subject land, authorized condominium lessees must purchase the underlying land within sixty days of acquisition. *Id.* § 2.3. In order to be eligible to buy the leased land, a purchaser must satisfy a list of seven requirements. *Id.* § 2.4.

Richardson II Summary Judgment Order at 29-32, City's Exh. C.

SUMMARY JUDGMENT STANDARD

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment shall be entered when:

> . . . the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The moving party has the initial burden of "identifying for the court those portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact." *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir.1987) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986)). The movant need not advance affidavits or similar materials to negate the existence of an issue on which the opposing party will bear the burden of proof at trial. *Celotex*, 477 U.S. at 323, 106 S.Ct. at 2553.

If the moving party meets its burden, then the opposing party must come forward with "specific facts showing that there is a genuine issue for trial" in order to defeat

the motion. Fed.R.Civ.P. 56(e); *T.W. Elec.*, 809 F.2d at 630. The opposing party cannot stand on the pleadings nor simply assert that it will discredit the movant's evidence at trial. *Id.* "If the factual context makes the [opposing] party's claim *implausible*, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial." *Cal. Arch. Bldg. Prods. v. Franciscan Ceramics*, 818 F.2d 1466, 1468 (9th Cir.1987) (citing *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986)).

The standard for summary judgment reflects the standard governing a directed verdict. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2512, 91 L.Ed.2d 202 (1986)). When there is a genuine issue of material fact, "the judge must assume the truth of the evidence set forth by the [opposing] party with respect to that fact." *T.W. Elec.*, 809 F.2d at 631. Inferences from the facts must be drawn in the light most favorable to the non-moving party. ***Id.***

DISCUSSION

I. *Preclusive Effect of Richardson II*

The City argues that the decision in *Richardson II* precludes Small Landowners from relitigating the constitutionality of Ordinance 91-95. The City advances res judicata (claim preclusion), collateral estoppel (issue preclusion), and judicial estoppel as the sources of the preclusion.

Res judicata or claim preclusion provides that a final judgment, "when rendered on the merits, is an absolute bar to a subsequent action between the same parties or those in privity with them, upon the same claim or demand." 1B *Moore's Federal Practice* ¶ 0.405[1] at p. III-4.

The City concedes that Small Landowners was not a party to the earlier suit, but argues that Small Landowners was in privity with the plaintiffs in *Richardson II*. "Privity" is more a conclusion based on the individual facts than a rigorous test. 18 Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure* § 4449 (1981). The predominant factor in determining privity is the connection between the two parties. *Id.* While both the *Richardson II* plaintiffs and Small Landowners are owners of condominiums affected by the statute, there is no other link shown. Thus, they are not in privity. Res judicata does not preclude Small Landowners.

The City argues in the alternative that collateral estoppel or issue preclusion bars relitigation of the issues decided in *Richardson II*. The doctrine of nonmutual collateral estoppel sometimes gives preclusive effect to earlier judgments obtained in litigation against others. *See Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 91 S.Ct. 1434, 28 L.Ed.2d 788 (1971); *Green v. Ancora-Citronelle Corp.*, 577 F.2d 1380, 1384 & n. 2 (9th Cir.1978). The most important limitation on nonmutual preclusion is that the party precluded had a "full and fair opportunity to litigate in the prior action." 18 Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure* § 4465 (1981).

Small Landowners did not have a full and fair opportunity to litigate in *Richardson II*. It would be unfair to bind them to a result that they were denied an opportunity to influence through their own arguments. Furthermore, if the City wanted to bind Small Landowners by the decision in *Richardson II*, it could have and should have joined Small Landowners as a party to that litigation. *Martin v. Wilks*, 490 U.S. 755, 109 S.Ct. 2180, 104 L.Ed.2d 835 (1989). Thus, Small Landowners is not collaterally estopped by *Richardson II*.

Finally, the City argues that principles of "judicial estoppel" preclude Small Landowners from relitigating the constitutionality of Ordinance 91-95.

Judicial estoppel does not apply here. The doctrine of judicial estoppel prevents a party from asserting a position that is inconsistent with an earlier position taken in the litigation. *Yanez v. United States,* 989 F.2d 323 (9th Cir.1993). Here, Small Landowners has not asserted any inconsistent earlier positions.

II. *Constitutional Challenges to Ordinance 91-95*

Both sides have moved for summary judgment on Small Landowners' claims that Ordinance 91-95 effects an impermissible taking, that it violates substantive due process, and that it violates the Equal Protection Clause.

A. *Takings Clause (Count I, VII, XIV)*

Count VII of the complaint alleges that Ordinance 91-95 effects an impermissible taking in violation of the Fifth Amendment to the United States Constitution. Count XIV alleges a violation of the Takings Clause of the Hawaii State Constitution. Count I alleges that the taking was a deprivation of constitutional rights actionable under 42 U.S.C. § 1983.

The Takings Clause of the Fifth Amendment to the United States Constitution states that "private property [shall not] be taken for public use, without just compensation." The Takings Clause applies to the states through the Fourteenth Amendment. *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229, 244 n. 7, 104 S.Ct. 2321, 2331 n. 7, 81 L.Ed.2d 186 (1984). Moreover, a state may delegate its power to condemn to a municipality. *Cf. Jacobson v. Tahoe Regional Planning Agency,* 566 F.2d 1353 (9th Cir.1977), *aff'd in part and rev'd in part on other grounds,* 440 U.S. 391, 99 S.Ct. 1171, 59 L.Ed.2d 401 (1979).

In *Midkiff*, the United States Supreme Court upheld Hawaii's Land Reform Act of 1967. That statute provided for condemnation of the fee simple interest of the land under leasehold single family residences. The Hawaii legislature had passed the Land Reform Act in an effort to correct a land oligopoly.

The Supreme Court found that the Land Reform Act's approach to correcting the land oligopoly problem was not irrational. *Id.* The Court elaborated:

> [The Land Reform Act,] like any other, may not be successful in achieving its intended goals. But "whether *in fact* the provision will accomplish its objectives is not the question: the [constitutional requirement] is satisfied if . . . the . . . [state] Legislature *rationally could have believed* that the [Act] would promote its objective." When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation —are not to be carried out in the federal courts. Redistribution of fees simple to correct deficiencies in the market determined by the state legislature to be attributable to land oligopoly is a rational exercise of the eminent domain power. Therefore, the Hawaii statute must pass the scrutiny of the Public Use Clause.

467 U.S. at 242-43, 104 S.Ct. at 2330.

The Takings Clause analysis under the Hawaii Constitution is similar. Article I, section 20 of the Hawaii Constitution reads, "[p]rivate property shall not be taken or damaged for public use without just compensation." In *Hawaii Housing Authority v. Lyman*, 68 Haw. 55, 704 P.2d 888 (1985), the Hawaii Supreme Court adopted a very deferential position similar to that in *Midkiff*:

> We therefore hold that once the legislature has spoken on the social issue involved, so long as the exercise of the eminent domain power is rationally related to the objective sought, the legislative public use declaration should be upheld unless it is palpably without reasonable foundation. The crucial inquiry is whether the legislature might reasonably consider the use public, and whether it rationally could have believed that application of the sovereign's condemnation powers would accomplish the public use goal.

Id. at 70-71, 704 P.2d 888.

The court now turns to the specific arguments advanced by Small Landowners.

1. *The City Council's Findings*

Small Landowners first argues that the City Council's findings are unsupported by the record. Specifically, Small Landowners asserts that there is no oligopoly in condominium ownership, that there is no shortage of fee simple condominiums, and that many lessees are financially better off than lessors.

Small Landowners has a difficult burden in attacking the City Council's findings of fact. The court must give deference to a legislative body's factual findings. A party challenging a factual finding made by a legislative body must show that "the legislative facts [relied upon] could not reasonably be conceived to be true by the governmental decisionmaker." *Vance v. Bradley*, 440 U.S. 93, 110-11, 99 S.Ct. 939, 949-50, 59 L.Ed.2d 171 (1979); *Lamb v. Scripps College*, 627 F.2d 1015 (9th Cir.1980).

Small Landowners suggests that the court should not defer to the factual findings of the City Council because it is a municipality rather than a state legislature. Although Small Landowners correctly notes that municipalities and states are treated differently in the Eleventh Amendment

immunity context, Small Landowners does not cite any case authority supporting its suggested distinction in this area.

The distinction is unwarranted because the deference given to legislative findings reflects a concern with the separation of powers between the legislature and the judiciary. It is as offensive to disturb the findings of city legislators as it is to disturb the findings of state legislators.

Moreover, despite the law review articles cited by Small Landowners, property owners are not "discrete and insular minorities" who deserve special judicial protection because they lack access to the political system. *United States v. Carolene Products Co.*, 304 U.S. 144, 58 S.Ct. 778, 82 L.Ed 1234 (1938). The absurdity of this suggestion is shown by the fact that the Bishop Estate is one of the institutions challenging this statute. The power of the Bishop Estate in Hawaii belies any claim that it lacks access to the political system.

Small Landowners suggests that the Supreme Court's decision in *Lucas v. South Carolina Coastal Council* signals reduced deference to legislative findings. —— U.S. ——, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). The *Lucas* Court rejected the South Carolina legislature's finding that construction on plaintiff's beach front property could be curtailed because it threatened serious public harm. In order to avoid compensating plaintiff for a regulatory taking, the Court held, the legislature would need to find that common law principles such as nuisance allowed the prohibition of the construction. *Id.* —— U.S. at ——-——, 112 S.Ct. at 2901-02.

Lucas does not mean that all legislative findings are suspect. Rather, it is distinguishable because the South Carolina legislature had a vested interest in finding that the plaintiff's use of his property caused harm. If the legislature determined that the use was harmful, it could restrict that use without paying compensation to the plaintiff. Thus, the legislature's finding of harm was inherently

suspect. There is no reason to extend this heightened scrutiny to physical Takings cases in which the legislature has already committed itself to paying compensation.

Thus, the court will give great deference to the City Council's findings. The City Council need not consider the best evidence. Rather, it must simply have some evidence that could convince a rational legislator of the truth of the findings.

Applying this standard, the court finds adequate support for the City Council's findings.[3] For example, the City Council found that the leasehold condominium system allowed lessors to renegotiate large lease rent increases. This is supported by the statements of many persons who testified before the City Council.[4] Similarly, the testimony supported the City Council's findings that some lessees could not buy the fee simple interest without a mandatory conversion program,[5] and that lessees were forced to surrender their improvements on the land.[6]

Small Landowners most vigorously attacks the City Council's finding that land ownership is concentrated in the hands of owners who have refused to sell their fee simple interests. Citing statistics, Small Landowners ar-

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[3] The court does not need to examine every finding. The findings that are supported provide an adequate basis for the Council to have passed the ordinance.

[4] *See, e.g.*, statements of Theresa Miyamoto, CX00019; Helen Higgins, ("I live at the Sandalwood, the apartment that was raised from affordable living to unaffordable right now.") CX00020; Darvin Haupert (lease rent increased by 8000 percent), CX00026-27; Knud Lindgard, CS00220; Richard Rosen, CX00252. All numbers refer to Bate stamp numbers given in Small Landowners' Exhibit 1.

[5] *See* Small Landowners Exhibit 1, testimony of Steve Holmes, CX00251; Edward Jurkens, CX00285; Jerome Manis, CX00283.

[6] *See*, Small Landowners Exhibit 1, Knud Lindgard, CX00220; Darvin Haupert, CX00215.

gues that the fee simple interests are spread among many owners and that there is no concentration of ownership.[7] Thus, Small Landowners contends, there is no oligopoly that would support the passage of the ordinance as in *Midkiff*.

Small Landowners' argument is fruitless. First, the City Council's finding is not that there is an oligopoly, but rather that ownership is concentrated among landowners who have refused to sell. That finding almost proves itself because landowners who have agreed to sell are no longer owners. Moreover, the fact that landowners have refused to sell is supported by the statements cited above. Thus, the City Council's finding has adequate support.

Second, even if the finding was unsupported, it would not invalidate the ordinance. The City Council made several adequately supported findings upon which it could rationally decide to exercise its eminent domain power. Small Landowners has not succeeded in invalidating those findings.

2. *The Use of Mandatory Conversion*

Small Landowners argues that even if the findings are accepted, the mandatory conversion is irrational because it cannot correct these problems. Small Landowners supports its argument by noting that single-family residence prices rose after the mandatory conversion program went into effect. Thus, Small Landowners suggests, a rational legislator could not believe that condominium prices would fall.

The City Council's choice need not be a wise one, it must merely be rational. Ordinance 91-95 passes this minimal test. Transferring the fee simple title to the lessees will end the problem of gouging lessees on lease rent

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[7] *See* Ezra, O'Connor, Moon & Tam Report, Exhibit 4 to Small Landowners' Motion, at 47 (415 of 466 landowners (89%) own land under only one condominium project).

negotiations. The ordinance will force sales by unwilling lessors. Furthermore, it will allow lessees to keep the value of their improvements on the land. The means chosen by the City Council is a rational one.

3. *Public Use Without Public Funds*

Small Landowners further argues that there is no taking "for public use" because private funds are used in the conversion.

This argument was flatly rejected in *Midkiff*. There, the Supreme Court upheld the legislature's finding of public use despite the fact that private funds were used to buy the fee simple interests. *Midkiff*, 467 U.S. at 241, 104 S.Ct. at 2329. The question is not the source of the funds, but rather whether the legislature rationally believed that the taking served a public purpose. *Id.*

The City Council reasonably believed that its eminent domain could solve the numerous problems that it found to have been caused by the condominium lease system. Thus, its decision to exercise its power comports with the constitution.

4. *Taking of a Cotenancy*

Small Landowners argues that the City may not condemn only a portion of the land, leaving the building's owner in a forced cotenancy with the former lessees. Small Landowners cites the following sentence from *Hendler v. United States*, 952 F.2d 1364, 1374 (Fed.Cir.1991): "The Government does not have the right to declare itself a co-tenant-in-possession with a property owner."

The citation is taken completely out of context, and does not affect the result here. In *Hendler*, the district court had held that no taking occurred when the statute allowed EPA inspectors to enter the land and conduct monitoring. The appellate court reversed, holding that the government's entry onto land was a taking of the right to sole possession, and was therefore compensable. *Id.* at

1374. The *Hendler* court did not hold, as Small Landowners suggests, that the government can never take a portion of a property and leave the rest. The government's ability to take only a limited interest in property has been repeatedly affirmed. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982) (government must pay for taking of land necessary for a roof top cable).

5. *Inadequate Compensation*

Small Landowners asserts that Ordinance 91-95 undercompensates the present owners for the value of the taken fee simple interests. This claim is unripe because the procedures challenged have never been used. *Southern Pacific v. City of Los Angeles*, 922 F.2d 498, 505-07 (9th Cir. 1990) (facial takings challenge alleging denial of just compensation is not ripe unless the plaintiff has sought compensation through the available procedures), *cert. denied*, ——— U.S. ———, 112 S.Ct. 382, 116 L.Ed.2d 333 (1991).

6. *Generalized Claims of Unfairness*

Small Landowners makes several generalized claims of unfairness as well.

Small Landowners argues that the City's tax policies forced landowners to develop condominiums which will be taken away by Ordinance 91-95. Even if this seems harsh to the landowners, it is not a basis to invalidate Ordinance 91-95. Tax policy can create social problems that a city may attempt to solve by rational means. Ordinance 91-95 is a rational attempt to solve the ills that the City Council found, whatever their source.

Small Landowners notes that all five of the City Council members who voted for Ordinance 91-95 have interests in leasehold condominiums. This is not a basis to invalidate the statute. If it were, the City Council could never pass

any statute dealing with condominiums. Disclosure of their interests allows the public to correct any problem through the political process.

B. *Substantive Due Process (Counts VIII and XV)*

Counts VIII and XV allege that Ordinance 91-95 violates Small Landowners' substantive due process rights under the Fourteenth Amendment to the United States Constitution and Article I, section 5 of the Hawaii Constitution.

In order to prevail on these claims, Small Landowners must establish that Ordinance 91-95 is "arbitrary and irrational." *Del Monte Dunes v. City of Monterey*, 920 F.2d 1496, 1508 (9th Cir.1990); *State v. Cotton*, 55 Haw. 148, 153, 516 P.2d 715 (1973). As explained above, Small Landowners does not meet this burden because the ordinance is a rational exercise of legislative power.

C. *Equal Protection (Counts IX, XVI)*

Counts IX and XVI allege that Ordinance 91-95 violates Small Landowners' equal protection rights guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, section 5 of the Hawaii Constitution. Small Landowners argues the ordinance irrationally groups small landowners with owners such as Bishop Estate who own many projects.

Legislative classifications not involving a suspect class must be rationally related to furthering a legitimate state interest. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 312, 96 S.Ct. 2562, 2566, 49 L.Ed.2d 520 (1976); *Estate of Coates v. Pacific Engineering*, 71 Haw. 358, 363, 791 P.2d 1257 (1990). Here, the City Council found that the refusal of both large and small landowners to sell their land created economic problems. Thus, the City Council rationally decided to treat the problem by

subjecting both large and small landowners to mandatory conversion. There is no constitutional problem with this approach.

Small Landowners misplaces two other arguments under the equal protection banner. First, it asserts that Ordinance 91-95 violates equal protection because landowners who are forced to sell their properties will have a difficult time avoiding taxes by replacing them with tax free "like kind" properties. This is definitely a disadvantage to those forced to sell, but it is not an equal protection violation.

Second, Small Landowners again asserts the unfairness of forcing land owners into a cotenancy with their former lessees. Again, this does not show the use of an irrational classification, so it is not a violation of the Equal Protection Clause.

In summary, the court holds that Ordinance 91-95 is constitutional under both the federal and state constitutions. Accordingly, the court DENIES Small Landowners' motion for summary judgment, and GRANTS the City's motion for summary judgment on Counts I, VII, VIII, IX, XIV, XV, and XVI of the complaint.

III. *Compliance with the City Charter (Count XXII)*

The City moves for summary judgment on Count XXII which alleges that Ordinance 91-95 conflicts with procedural requirements of Section 3-110 of the City Charter. Section 3-110 requires that the City Council, prior to taking property under its eminent domain power, shall adopt a resolution declaring the necessity of the taking as well as other information regarding the property.

This issue is not ripe for a facial challenge to the statute. When the City actually condemns property, it will presumably be required to comply with the Charter. That question should be reserved for another day. Accordingly,

the court GRANTS the City's motion for summary judgment on Count XXII.

CONCLUSION

In summary, this case is indistinguishable from *Midkiff*, and the lenient standards set there compel a conclusion that Ordinance 91-95 is a rational and constitutionally permissible exercise of the eminent domain power.

IT IS SO ORDERED.

APPENDIX D

[Filed Mar. 6, 1998]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 94-16041

D.C. No. CV-91-00725-DAE

WILLIAM S. RICHARDSON; HENRY H. PETERS, JR.; OSWALD K. STENDER, MYRON B. THOMPSON, *and* MATSUO TAKABUKI, in their capacities as Trustees of the Kamehameha Schools/Bernice Pauahi Bishop Estate
Plaintiffs-Appellants,

v.

CITY AND COUNTY OF HONOLULU, a Hawaii Municipal Corporation,
Defendant-Appellee,

and

HALE COALITION,
Intervenor.

No. 94-16142

D.C. No. CV-91-00725-DAE

WILLIAM S. RICHARDSON; HENRY H. PETERS, JR.; OSWALD K. STENDER, MYRON B. THOMPSON, *and* MATSUO TAKABUKI, in their capacities as Trustees of the Kamehameha Schools/Bernice Pauahi Bishop Estate,
Plaintiffs-Appellees,

and

HALE COALITION,
Intervenor.

v.

CITY AND COUNTY OF HONOLULU,
a Hawaii Municipal Corporation,
Defendant-Appellant.

No. 94-16143

D.C. No. CV-91-00725-DAE

WILLIAM S. RICHARDSON; HENRY H. PETERS, JR.; OSWALD K. STENDER, MYRON B. THOMPSON, *and* MATSUO TAKABUKI, in their capacities as Trustees of the Kamehameha Schools/Bernice Pauahi Bishop Estate,
Plaintiffs-Appellees,

v.

HAWAII LEASEHOLDERS EQUITY COALITION,
Intervenor-Appellant,

and

CITY AND COUNTY OF HONOLULU,
a Hawaii Municipal Corporation,
Defendant.

No. 94-16327

D.C. No. CV-92-00372-HMF

SMALL LANDOWNERS OF OAHU,
Plaintiff-Appellant,

v.

CITY AND COUNTY OF HONOLULU,
Defendant-Appellee.

ORDER

Before: HUG, Chief Judge, THOMPSON and O'SCANNLAIN, Circuit Judges.

Chief Judge Hug and Judge Thompson have voted to deny Plaintiff-Appellants' petitions for rehearing and to reject the suggestions for rehearing en banc. Judge O'Scannlain has voted to grant the petitions for rehearing and to accept the suggestions for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petitions for rehearing are denied and the suggestions for rehearing en banc are rejected.

APPENDIX E

[Filed Apr. 18, 1994]

UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

Case Number: 91-00725DAE

WILLIAM S. RICHARDSON, *et al.*,
Plaintiffs,

v.

CITY AND COUNTY OF HONOLULU,
a Hawaii municipal corporation,
Defendant,

and

HALE COALITION,
Intervenor.

JUDGMENT IN A CIVIL CASE

☒ *Decision by Court.* This action came for hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that judgment is hereby entered pursuant to the "Order Granting In Part And Denying In Part Motions For Summary Judgment And Certifying Question To Hawaii Supreme Court," filed on September 16, 1992 and the "Order Concerning Parties' Cross-Motions For Summary Judgment On Count XIII Of The Complaint," filed on April 12, 1994.

Date Apr. 18, 1994

/s/ Walter A.Y.N. Chinn
Clerk

[Filed Jun. 20, 1994]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 92-00372 HMF

SMALL LANDOWNERS OF OAHU,
a Hawaii nonprofit corporation,
Plaintiff,

vs.

CITY AND COUNTY OF HONOLULU,
a Hawaii municipal corporation,
Defendant.

FINAL JUDGMENT

The Court having issued a decision on September 16, 1993, granting summary judgment in favor of defendant and against plaintiff on the claims contained in Counts I, VII, VIII, IX, XIV, XV, XVI and XXII of the Complaint for Declaratory Relief filed herein on June 12, 1992, and the parties having previously stipulated to dismissal of the remaining claims in said Complaint;

IT IS ORDERED AND ADJUDGED that final Judgment is hereby entered in favor of defendant and against plaintiff on all claims before the court.

Dated: Honolulu, Hawaii, Jun. 20, 1994.

/s/ Harold M. Fong
HAROLD M. FONG
United States District Judge

APPENDIX F

ORDINANCE NO. 91-95 BILL NO. 156 (1990)
CD-1, FD-1

A BILL FOR AN ORDINANCE RELATING TO RESIDENTIAL CONDOMINIUM AND COOPERATIVE LEASEHOLD CONVERSION FOR REAL PROPERTY SITUATED IN THE CITY AND COUNTY OF HONOLULU.

BE IT ORDAINED by the People of the City and County of Honolulu:

SECTION 1. Findings and Purpose.

The Council finds that:

(a) The historical pattern of landownership on Oahu has led to the practice of landowners leasing rather than selling their land. Ownership of land beneath residential condominium apartments, cooperative housing units and residential planned developments on Oahu is consistent with this pattern and is concentrated in the hands of the owners of such land who have refused to sell proportionate shares in their fee simple titles to such land to the lessees residing in residential condominium apartments, cooperative housing units and planned developments situated on such land and who have instead engaged in the practice of leasing such proportionate shares of their lands to such lessees under long-term leases.

Runaway land prices, especially in the last three years, have put housing costs well beyond the means of a large segment of the population. These prices are driving up new leasehold ground rents (lease rents) that in large measure are based upon present fee values.

Under the terms of most residential leases, the renegotiated lease rent amount is typically based on land values existing at the time of renegotiation. As a result, the

acute recent inflation of land costs has adversely affected lease rent negotiations of persons who have purchased leasehold multi-family units as their homes: in some instances renegotiations have resulted in lease rents that have increased over 1,000 percent. Under the burden of increased lease rents, many owner-occupants of residential condominium apartments, cooperative housing units and planned development units, especially those on fixed incomes, have found, and will continue to find themselves unable to afford to continue living in their homes. If they are displaced from these homes, these owner-occupant lessees could be displaced entirely from the ranks of homeowners because of Oahu's continuing housing crisis. Therefore, there is a desire by many lessees to convert to fee ownership. At the present time, there are approximately 16,000-17,000 residential condominium, cooperative and planned development units on leased land on Oahu.

The refusal of such landowners to sell proportionate shares in their fee simple titles to their lands to such lessees and cooperative owners and the pervasiveness of such practice of leasing rather than selling such shares in the land has resulted in a serious shortage of fee simple residential condominium land, cooperative housing unit land and planned development land and in an artificial inflation of the value of such land on Oahu.

Due to such shortage of fee simple residential condominium, cooperative and planned development land and such artificial inflation of such land values, many people on Oahu have been deprived of a choice to own an interest in or take a lease of the land on which their residential condominium, cooperative and planned development homes are situated and have been required instead to pay exorbitant leased fee purchase prices for a proportionate fee simple ownership share in such land. These lessees have been forced to accept long-term leases or renewed leases of such land which contain terms and conditions that are financially disadvantageous to them, that restrict

their freedom to fully enjoy such land and that are weighted heavily in favor of the landowners; or to surrender title to and possession of their residential condominium, cooperative and planned development homes at the expiration of their current leases.

The acquisition by people, who are lessees and owners of condominium apartments, cooperative housing units and planned development units, of proportionate shares of the land on which their homes are situated in fee simple, at fair and reasonable prices and the ability of such lessees and owners to fully enjoy such land through proportionate ownership of such land in fee simple will alleviate these conditions and will promote the economy of Oahu and public interest, health, welfare, security and happiness of such lessees and owners.

There is a close relationship between the monetary values accorded land on Oahu and the stability and strength of Oahu's economy as a whole. Residential condominium, cooperative housing and planned development land values, artificially inflated by concentrated or single ownership, market conditions or other factors, skew Oahu's economy toward unnecessarily high levels. The pervasive and substantial contribution made to inflation by high residential condominium, cooperative housing and planned development land values creates a potential for economic instability and disruption on Oahu. Economic inflation, instability and disruptions on Oahu have real and potential damaging consequences for all members of an affected society. Checking inflation, improving the stability of the economy, and avoiding disadvantageous economic disruptions all are productive of general benefit to all members of Oahu's community.

The sound and wise conservation, preservation, use and management of residential condominium, cooperative housing and planned development land cannot be separated from the subject of patterns of residential condominium, cooperative and planned development land

ownership. To accomplish the public purpose of wisely conserving, preserving, using, and managing residential condominium, cooperative housing and planned development land on Oahu requires changing present patterns of residential condominium, cooperative housing and residential planned development land ownership. Changing present patterns of such land ownership on Oahu by allowing residential condominium lessees, cooperative housing unit owners and planned development housing owners under leases of such land to purchase in fee simple, a proportionate share of such land on which their homes are situated through the exercise of the City's power of eminent domain to acquire such fee simple interest to such land and public financing of such purchase and such condemnation and payment through the issuance of bonds, the expenditure of general revenue funds and the use of private funds which are at the disposal of the City, will help to satisfy the pressing public necessity for a secure, strong and stable Oahu economy.

The use of the City's eminent domain power to condemn the fee simple title to residential condominium, cooperative housing units and residential planned development land and the payment of just compensation therefor for the purpose of making proportionate shares of the fee simple title thereto and the use thereof available for acquisition by people who are condominium lessees, cooperative housing unit owners and owners of planned development units under leases of such land on which their homes are situated, or who face imminent expiration of such leases and the potential surrender, altogether, of title to and possession of their residential condominium apartments, cooperative housing units and planned development units in accordance with such leases is for a public use and purpose.

The power of the City to use eminent domain to effectuate the purposes and objectives of this Bill is granted to the City under Sections 46-1.5(6), (13) and (16) and Chapter 101, Hawaii Revised Statutes.

(b) It is therefore declared to be necessary and it is the purpose of this Ordinance to alleviate the conditions found in subsection (a) of this ordinance by providing for the right of any person who is a lessee or owner under a long-term lease of residential condominium, cooperative housing unit or residential planned development land on Oahu to purchase at a fair and reasonable price a proportionate share of the fee simple title to such land, by providing for the condemnation of the fee simple title to such land and the payment of just compensation therefor by the City through the use of its eminent domain power and by providing for the public financing of such purchase and such condemnation and payment through the issuance of bonds, the expenditure of general revenue funds and the use of private funds which are at the disposal of the City.

SECTION 2. The Revised Ordinances of Honolulu is amended by adding a new chapter to be appropriately designated and to read as follows:

"CHAPTER —.

RESIDENTIAL CONDOMINIUM, COOPERATIVE HOUSING AND RESIDENTIAL PLANNED DEVELOPMENT LEASEHOLD CONVERSION.

ARTICLE 1. GENERAL PROVISIONS.

Sec. —-1.1. Purpose. The purpose of this Chapter is to establish the right of any person, who is a lessee under any long-term lease of land upon which are situated either residential condominium property regime projects created under Chapter 514A, Hawaii Revised Statutes, cooperative housing unit projects or residential planned development projects, to purchase at a fair and reasonable price the fee simple title to such land.

Sec. —-1.2. Definitions. Unless otherwise clear from the context, as used in this Chapter "Association of apartment owners" has the same meaning as in section 514A-3, Hawaii Revised Statutes.

"City" means the City and County of Honolulu.

"Condominium" means a residential apartment, together with an appurtenant undivided interest in common elements, located on land subject to a declaration of condominium property regime as defined in Chapter 514A, Hawaii Revised Statutes, together with an appurtenant undivided interest in common elements, both used or occupied, or developed, devoted, intended, or permitted to be used or occupied as a principal place of residence for a single family.

"Condominium property regime" means a condominium property regime project established under Chapter 514A, Hawaii Revised Statutes.

"Cooperative" means a residential apartment in a housing project held, owned, or leased by a cooperative housing corporation.

"Cooperative housing corporation" means a corporation which satisfies the requirements of section 519-3(d)(1), Hawaii Revised Statutes, or of Chapter 421H, Hawaii Revised Statutes, and the requirements of section 216 of the Internal Revenue Code of 1986, as amended.

"Department" means the City department of housing and community development created by Article 6, Chapter 10, Revised Charter of the City and County of Honolulu 1973, as amended.

"Development" means an area of land, irrespective of size, which:

(1) Is subject to a declaration of condominium property regime pursuant to Chapter 514A, Hawaii Revised Statutes, which condominium property regime contains or is intended to contain condominium apartment units occupied or to be occupied under apartment leases or condominium conveyance documents; or

(2) Contains or is intended to contain a cooperative housing unit project held, owned or leased by a cooperative housing corporation.

(3) Contains or is intended to contain a residential planned unit development project.

To qualify as a development, there shall be ten or more residential condominium apartment units, cooperative housing apartment units or residential planned development housing units on the land.

"Director" means the director of the department of housing and community development.

"Fair market value" means that amount of money that a purchaser willing, but not obliged, to buy land or an interest in land would pay to an owner willing, but not obliged, to sell the land or interest in land in an open market, taking into consideration all uses to which the land is adapted or might in reason be applied.

"Fee owner" means the person who owns the fee simple title to the land leased under an apartment lease, condominium conveyance document, or proprietary lease, including a life tenant with a remainder over, vested or contingent, and a holder of a defeasible estate, and the person's heirs, successors, legal representatives, and assigns.

"Lease" means the conveyance of land or an interest in land by a fee simple owner as lessor, to a lessee or sublessee, or by any other person as sublessor to any person, in consideration of payment of rent or other recompense. With respect to a cooperative, lease means a ground lease to the cooperative housing corporation and not leases to the individual apartment unit owners.

"Leased fee" and "leased fee interest" mean reversionary interests of the fee owner, lessor, and all legal and equitable owners of land which is leased, other than the lessee's or sublessee's interest.

"Legal and equitable owners" means the fee simple owner and all persons having legal or equitable ownership interests in the leased fee or in the lessor's leasehold estate, including mortgagees, developers, lienors, and sublessors, and their respective heirs, successors, legal representatives, and assigns.

"Lessee" means any person to whom land is leased or subleased, including the person's heirs, successors, legal representatives, and assigns and who is the owner-occupant of the residential condominium unit, residential cooperative housing unit or residential planned development unit.

"Lessor" means any person who leases or subleases land to another, and the person's heirs, successors, legal representatives, and assigns.

"Person" means any person who leases or subleases land from a lessor and, for purposes of this Chapter, means the same as the term "lessee" as used in this Chapter.

"Planned development" means a housing development project, also known as a cluster housing development or planned unit development, where the apartment owner holds a leasehold interest in the lot under his or her unit, and provided that this interpretation excludes any planned unit development covered by Chapter 516, Hawaii Revised Statutes.

The terms "lessors," "lessees", "fee owner", and "legal and equitable owners" include individuals, both masculine and feminine, and the terms also include corporations, firms, associations, trusts, estates, and the State and the City and County of Honolulu. When more than one person are the lessors, lessees, fee simple owners, fee owners, or legal and equitable owners of a lot, the terms apply to each of them, jointly and severally.

The term "owner-occupant" means any individual in whose name sole or joint legal title is held in a residential condominium unit, residential cooperative apartment unit or residential planned development unit which, simultane-

ous to the individual's ownership, serves as the individual's principal place of residence for a period of not less than one year immediately prior to application for conversion, as well as during the period pending legal proceedings to acquire the fee; provided that the individual shall retain complete possessory control of the premises of the residential unit during these periods. An individual shall not be deemed to have complete possessory control of the premises if the individual rents, leases, or assigns the premises for any period of time to any other person in whose name legal title is not held. Proof of residency and possessory control shall be as established by rules adopted by the Department.

The term "owner-occupant-shareholder" means any individual who is a sole or joint legal owner of shares in a cooperative housing corporation or trust and leases a cooperative apartment unit which, simultaneous to the individual being a shareholder, serves at the individual's principal place of residence for a period of not less than one year immediately prior to application for conversion, as well as during the period pending legal proceedings to acquire the fee; provided that the individual shall retain complete possessory control of the premises of the residential unit during these periods. An individual shall not be deemed to have complete possessory control of the premises of the unit if the individual rents, leases, or assigns the premises for any period of time to any other person who is not a shareholder and does not have a proprietary lease to the cooperative apartment unit. Proof of residency and possessory control shall be as established by rules adopted by the Department.

For purposes of this Chapter, the terms "residential condominium apartment", "residential condominium housing unit", "residential cooperative housing unit", "residential cooperative apartment unit", or "residential planned development unit" shall not include the following:

(1) a unit used for commercial purposes;

(2) a unit used as a time share unit or transient vacation unit, as defined under Chapter 21A, article 9; or

(3) any other nonresidential condominium, cooperative, or planned development unit.

Sec. —1.3. Applicability. This Chapter applies to all lands, in the City and County of Honolulu on which are situated either residential condominium property regime projects created under Chapter 514A, Hawaii Revised Statutes, cooperative housing units projects or residential planned development projects owned or held privately or by the City and County of Honolulu or by the State, except Hawaiian home lands subject to Article XII of the Constitution of the State and lands owned or held by the federal government. This Chapter is not meant to supersede or preclude any other remedy at law available to condominium apartment owners, cooperative housing corporations or owners of residential planned development units, including those available under Chapter 480, Hawaii Revised Statutes.

Sec. —1.4. No estoppel or waiver. The rights granted to lessees by this Chapter shall be effective, notwithstanding any provision in any lease, contract, covenant, bylaw, or articles of incorporation to the contrary. No lessee shall be estopped by any covenant, term, condition, or contract, however worded, from claiming the rights granted by this Chapter, or otherwise be deemed to have waived those rights. Any provision in any lease, covenant, contract, bylaw or article of incorporation contrary to the intent or purpose of this Chapter shall be void.

Sec. —1.5. Trusts and estates. The rights granted to lessees by this Chapter shall be effective, notwithstanding any condition or provision to the contrary in any instrument creating any life tenancy, defeasible fee, estate, or trust, regardless of whether the tenancy, fee, estate, or trust was in effect prior to the effective date of this Chapter or is created hereafter; and the life tenant, holder, officer, or trustee of any tenancy, defeasible fee, estate,

or trust may convey residential leases for terms exceeding twenty years and shall perform all acts required by this Chapter. Every instrument of this type now in existence or hereafter executed shall be construed in conformity with the intent and purpose of this Chapter. No trustee, officer, or agent of a lessor or other legal or equitable owner, while acting pursuant to this Chapter, shall be deemed to be acting in bad faith or to have committed a breach of trust.

Sec. —1.6. Penalty. Any person who violates any provision of this Chapter shall be fined not more than $1,000 or imprisoned not more than one year, or both. All fines collected shall be deposited in the fee simple revolving fund created by section —6.1.

Sec. —1.7. Administration of Chapter. The department of housing and community development shall administer this Chapter.

Sec. —1.8. Department's duties, generally. In addition to any other duty prescribed by law and in this Chapter, the director of the department of housing and community development shall:

(1) Within six months after the effective date of this Chapter, adopt in accordance with Chapter 91, Hawaii Revised Statutes, rules necessary to effectuate the purposes of this Chapter;

(2) Be responsible for enforcement of this Chapter and the rules adopted pursuant to it;

(3) Establish reasonable fees to be assessed and collected from lessees for the services of any appraiser;

(4) Disseminate information and render assistance to lessees of residential condominiums, cooperative housing developments and residential planned developments in order that this Chapter may be understood and effectively implemented;

(5) Conduct an investigation upon any written complaint or whenever it appears that a provision

of this Chapter has been or is being violated. In the investigation, the director may examine the books, accounts, records, and files of any person connected with the matter under investigation and conduct hearings. If the director finds from satisfactory evidence that any person has violated or is violating this Chapter, the director may order the person to cease and desist from continuing the violation or engaging in or doing any act or acts in furtherance thereof and, where necessary, the director may bring an action in the name of the city and county of Honolulu in any court of competent jurisdiction for enforcement of its orders;

(6) Facilitate the acquisition of all necessary property interests by the city through eminent domain proceedings as provided in this Chapter;

(7) Facilitate the making and execution of contracts, mortgages, and other instruments necessary or convenient to the exercise of the powers of the city under this Chapter;

(8) From time to time, require from the lessors of leases of residential condominiums, cooperative housing developments and residential planned developments and from all fee owners and legal and equitable owners of such condominiums, cooperatives and planned developments subject to leases of land, such information as it may reasonably require in connection with the administration of this Chapter; and

(9) Do all things necessary and convenient to carry out the powers expressly conferred upon the director by this Chapter.

Sec. —1.9. Quitclaim deeds. Unless otherwise provided by law, the City shall issue quitclaim deeds whenever it conveys, transfers, sells, or assigns any property developed, constructed, or sponsored under this Chapter.

ARTICLE 2. CONDEMNATION OF CONDOMINIUM DEVELOPMENT LEASEHOLDS.

Sec. —-2.1. Applicability. This Article applies to developments which, at the time of acquisition of the development by the City, are:

(1) Developed into condominium property regimes or occupied by residential lessees under leases or condominium conveyance documents executed before the effective date of this Chapter; or

(2) Developed or partially developed into condominium property regimes occupied or to be occupied by residential lessees under apartment leases or condominium conveyance documents executed on or after the effective date of this Chapter; provided that ninety per cent of the leases to units in the condominium have been executed.

Sec. —-2.2. Designation of development for acquisition. (a) Subject to subsection (b), the department may designate all or that portion of a development containing residential condominium land for acquisition, and facilitate the acquisition of the applicable leased fee interests in that land by the City through the exercise of the power of eminent domain or by purchase under the threat of eminent domain, after:

(1) At least twenty-five (25) of all the condominium owners within the development or at least owners of fifty percent (50%) of the condominium units, whichever number is less, apply to the department to purchase the leased fee interest pursuant to section —-2.4, and file an application with the department; and

(2) Due notice is given and a public hearing held, the time and place of which have been duly advertised in a newspaper of general circulation in

the City and County of Honolulu, on at least three different days, the last publication being not less than five days before the date of hearing, the department finds that the acquisition of the leased fee interest in the development or a portion thereof, through exercise of the power of eminent domain or by purchase under threat of eminent domain and the disposition thereof as provided in this part, will effectuate the public purposes of this Chapter.

For purposes of this subsection, "condominium owners" means the owner-occupants of the condominimum development.

(b) The land designated and acquired by the City may consist of a portion of or the entirety of the land area submitted to the declaration of condominium property.

Sec. —2.3. Purchase of leased fee interest. The condominium lessees who have authorized approval and who have qualified for purchase of the leased fee interest, shall purchase from the City within sixty days of acquisition of the interest by the City, the leased fee interest appertaining to their condominiums, together with an undivided leased fee interest equal to the percentage of common interest appurtenant to the lessees' condominium units, subject to the terms, covenants, and conditions of the contract executed with the City. If any lessee refuses to enter into such a contract, then in that event, such lessee shall pay to the City all costs incurred by the City in the acquisition of the appurtenant condominium leased fee interest within the development including but not limited to appraisal costs, costs of publication, and survey, and the department is authorized to take whatever action it deems necessary to collect the costs; and provided further that in case of a wilful breach of the purchase agreement, the City shall be entitled to any available remedy, including the sale of its interest in the condominium.

Sec. —2.4. Qualification for purchase. (a) No sale of any condominium land within a development shall be made unless the lessees:

(1) Are at least eighteen years of age and are owner-occupants of their condominium units;

(2) Are bona fide residents of the City and County of Honolulu;

(3) Have legal title to, or pursuant to an agreement of sale, have an equitable interest in a condominium situated on the leased property applied for; provided that for purposes of this section, the vendor under such agreement of sale shall not be eligible for purchase that property. An "agreement of sale" means an executory contract for the sale and purchase of real property which binds one party to sell and the other party to buy property which is the subject matter of the transaction;

(4) Do not own property in fee simple lands suitable for residential purposes within the city and county of Honolulu or have pending before the State housing finance and development corporation, or the City department of housing and community development an unrefused application to lease or purchase residential real property for dwelling unit purposes. A person is deemed to own lands, for the purpose of this paragraph, if the person, the person's spouse, or both the person and the person's spouse (unless separated and living apart under a decree of a court of competent jurisdiction) own lands, including any interest in a land trust in the city and county of Honolulu;

(5) Submit a letter of credit, certificate of deposit, proof of funds, or approved application from any lending institution demonstrating that the lessees who are participating in the purchase of

the fee interest will be able to pay the City promptly for the leased fee interests;

(6) Submit an application for the purchase of the leased fee interest in good faith, and in such form as is acceptable to the department; and

(7) Execute a contract for the purchase of the fee interest in such form as is acceptable to the department.

(b) In the event of a wilful breach of contract by the lessees, the City may sell or assign its interest without respect to the requirements of this section.

(c) The department may require additional testimony or evidence under oath in connection with any application. The determination by the department of any applicant's eligibility under this part shall be conclusive as to all persons thereafter dealing with the property; provided that the making of any false statement knowingly by applicants or other persons in connection with any application shall constitute perjury and be punishable as such.

(d) The department shall adopt rules under Chapter 91, Hawaii Revised Statutes, to effectuate the purposes of this section.

Sec. —2.5. Deposits by lessees. (a) The department may require the submission of a deposit by lessees seeking to purchase the leased fee interest in their condominiums pursuant to this Chapter. The means of determining the amount of the deposit shall be established by rule.

(b) The deposit may be applied by the department to payment of appraisal, survey, attorney fees, administrative costs, and any other costs the department has incurred as a result of the designation, with the remainder of the deposit to be applied toward the purchase of the owner's fee interest. The department shall incur no liability for the deposits under this section.

Sec. —-2.6. Preliminary negotiation required. (a) Upon the filing with the department of an application by the lessees in accordance with Sec. —-2.2(a)(1) of this Article, the department shall request the lessor and the lessees to negotiate the just compensation which the lessees will pay to the lessor to acquire the lessor's interest in the development. If no agreement is reached within sixty days after the request to negotiate, the parties shall simultaneously exchange written final offers together with any appraisals, other documents, and any other expert opinions on which their negotiating positions were based. Copies of the final offers and related documents shall be submitted to the department and the department may use the information in determining, prior to commencing condemnation proceedings, the probability that the lessees will be able to meet the financial requirements of section —-2.4(5).

(b) This preliminary negotiation shall be in advance of and shall not constitute any part of any action in condemnation or eminent domain.

Any offers, appraisals, other documents, or any other expert opinions giving a value of the lessor's interest in the condominium development which were prepared by a party for use in preliminary negotiations as provided for in this section, for setting qualification amounts pursuant to section —-2.4(5) or for negotiations to determine the just compensation after designation to acquire the lessor's interest in the development, and were not prepared for use in the trial shall not be discoverable, usable, or admissible by an opposing or adverse party in any action, suit, or proceeding brought under this Chapter.

Sec. —-2.7. Eminent domain trial. The parties to the eminent domain action brought under this Chapter shall be the City as plaintiff and the lessees, and the lessors and all other necessary parties as defendants. All parties shall be given an opportunity to present evidence of the fair market value of the leased fee interest being acquired.

ARTICLE 3. CONDEMNATION OF COOPERATIVE HOUSING DEVELOPMENT LEASEHOLDS.

Sec. —3.1. Applicability. This Article applies to developments which, at the time of acquisition of the development by the City, are leased to cooperative housing corporations that sublease individual apartments to residential lessees under proprietary leases executed either prior to or after the effective date of this Chapter; provided that ninety per cent of the proprietary leases to the cooperative have been executed.

Sec. —3.2. Designation of development for acquisition. (a) Subject to subsection (b), the department may designate all of a development for acquisition, and facilitate the acquisition of the leased fee interests in the development by the City through the exercise of the power of eminent domain or by purchase under the threat of eminent domain after:

(1) The cooperative housing corporation applies to the department to purchase the leased fee interest pursuant to section —3.4 after the cooperative housing corporation receives approval from its shareholders; and

(2) If, after due notice and public hearing, the time and place of which have been duly advertised in a newspaper of general circulation in the City and County of Honolulu, on at least three different days, the last publication being not less than five days before the date of hearing, the department finds that the acquisition of the leased fee interest in the development, through exercise of the power of eminent domain or by purchase under threat of eminent domain and the disposition thereof as provided in this Article will effectuate the public purposes of this Chapter.

(b) The development designated and acquired by the City shall consist of the entire land parcel leased to a cooperative housing corporation.

(c) Where the cooperative housing development consists of both residential and nonresidential units, the terms "development", "cooperatives", or similar terms when used in this Article, including the provisions on acquisition, disposal, and financing of cooperatives and developments, shall be construed to apply only to the residential units.

Sec. —3.3. Purchase of leased fee interest. The cooperative housing corporation which has applied to the department and which has qualified for purchase of the leased fee interest, shall purchase from the City within sixty days of acquisition of the interest by the City, the entire leased fee interest appertaining to the cooperative subject to the terms, covenants, and conditions of the contract executed with the City provided that:

(1) If the cooperative housing corporation refuses to enter into such a contract, then it shall pay to the City all costs incurred by the City in the acquisition of the leased fee interest including, but not limited to, appraisal costs, costs of publication, and survey, and the department is authorized to take whatever action it deems necessary to collect these costs;

(2) In case of a wilful breach of the purchase agreement, the City shall be entitled to any available remedy, including the sale of its interest in the cooperative.

Sec. —3.4. Qualification for lease or purchase. (a) No sale of any leased fee interest in a cooperative housing development to a cooperative housing corporation shall be made unless the cooperative housing corporation satisfies the following requirements:

(1) Submission of proof, in such form as is acceptable to the department, that a majority of the shareholders of the cooperative housing corpora-

tion have approved or ratified the purchase of the leased fee interest of the development;

(2) Submission of a letter of credit, certificate of deposit, proof of funds, or approved application from any lending institution demonstrating that the cooperative housing corporation will be able to promptly pay the City for the leased fee interest;

(3) Submission of an application for purchase of the leased fee interest in good faith, and in such form as is acceptable to the department;

(4) Execution of a contract for the purchase of the leased fee interest in such form as is acceptable to the department; and

(5) Submission of proof, in such form as is acceptable to the department, that at least sixty per cent of the cooperative housing corporation consists of owner-occupant-shareholders of residential units within the affected cooperative housing development.

(b) In the event of a wilful breach of contract by the cooperative housing corporation, the City may sell or assign its interest without respect to the requirements of this section.

(c) The department may require additional testimony or evidence under oath in connection with any application. The determination by the department of any applicant's eligibility under this part shall be conclusive as to all persons thereafter dealing with the property; provided that the making of any false statement knowingly by applicants or other person in connection with any application shall constitute perjury and be punishable as such.

(d) The department shall adopt rules under Chapter 91, Hawaii Revised Statutes, to effectuate the purposes of this section.

Sec. —-3.5. Deposits by lessees. (a) The department may require the submission of a deposit by the cooperative housing corporation applying to the department for the purchase of the leased fee interest pursuant to this Chapter. The amount of the deposit shall be established by rule.

(b) The deposit may be applied by the department to payment of appraisal, survey, attorney fees, administrative costs, and any other costs the department has incurred as a result of the designation, with the remainder of the deposit to be applied toward the purchase of the owner's fee interest. The department shall incur no liability for those deposits under this section.

Sec. —-3.6. Preliminary negotiation required. (a) Upon the filing of a petition by the cooperative housing corporation with the department, the department shall request the lessor and the cooperative housing corporation to negotiate the just compensation which the cooperative housing corporation will pay to the lessor to acquire the lessor's interest in the development. If no agreement is reached within sixty days after the request to negotiate, the parties shall simultaneously exchange written final offers together with any appraisals, other documents, and any other expert opinions on which their negotiating positions were based. Copies of the final offers and related documents shall be submitted to the department and the department may use the information in determining, prior to commencing condemnation proceedings, the probability that the cooperative housing corporation will be able to meet the financial requirements of section —-3.4(2).

(b) This preliminary negotiation shall be in advance of and shall not constitute any part of any action in condemnation or eminent domain.

Any offers, appraisals, other documents, or any other expert opinions giving a value of the lessor's interest in the

land beneath the development, which were prepared by a party for use in preliminary negotiations as provided for in this section, for setting qualification amounts pursuant to section -3.4(2) or for negotiations to determine the just compensation after designation to acquire the lessor's interest in the development, and were not prepared for use in the trial, shall not be discoverable, usable, or admissible by an opposing or adverse party in any action, suit, or proceeding brought under this Chapter.

Sec. —3.7. Eminent domain trial. The parties to the eminent domain action brought under this Chapter shall be the City as plaintiff and the cooperative housing corporation, lessors, landowners and all other necessary parties as defendants. All parties shall be given an opportunity to present evidence of the fair market value of the leased fee interest being acquired.

ARTICLE 4. CONDEMNATION OF RESIDENTIAL PLANNED DEVELOPMENT LEASEHOLDS.

Sec. —4.1. Applicability. This Article applies to residential planned developments which, at the time of acquisition of the development by the City, are:

(1) Developed into residential planned developments and occupied by residential lessees under apartment leases or planned development conveyance documents executed before the effective date of this Chapter; or

(2) Developed or partially developed into such planned developments occupied or to be occupied by residential lessees under apartment leases or planned development conveyance documents executed on or after the effective date of this Chapter; provided that ninety per cent of such leases to the planned unit development have been executed.

Sec. —-4.2. Designation of development for acquisition. (a) Subject to subsection (b), the department may designate all or a portion of the land beneath a planned development containing residential units for acquisition, and facilitate the acquisition of the applicable leased fee interests in such land by the City through the exercise of the power of eminent domain or by purchase under the threat of eminent domain, after:

(1) At least twenty-five (25) of all the owners within the development or at least owners of fifty percent (50%) of the residential units, whichever number is less, of all the owners within the planned development apply to the department to purchase the leased fee interest pursuant to section — -4.4, and file the application with the department; and

(2) Due notice and public hearing, the time and place of which have been duly advertised in a newspaper of general circulation in the city and county of Honolulu, on at least three different days, the last publication being not less than five days before the date of hearing, the department finds that the acquisition of the leased fee interest in the development or a portion thereof, through exercise of the power of eminent domain or by purchase under threat of eminent domain and the disposition thereof as provided in this part will effectuate the public purposes of this Chapter.

For purposes of this subsection, "owners", as used in Sec. — -4.2(a)(1) means the owner-occupants of the planned developments.

(b) The land designated and acquired by the city may consist of a portion of or the entire land area submitted to the declaration of planned development.

Sec. —4.3. Purchase of leased fee interest. The planned development lessees, who have authorized approval and who have qualified for purchase of the leased fee interest, shall purchase from the city within sixty days of acquisition of the interest by the city, the leased fee interest appertaining to the planned development unit, together with an undivided leased fee interest equal to the percentage of common interest appurtenant to their units, subject to the terms, covenants, and conditions of the contract executed with the city; if any lessees refuse to enter into such a contract, then in that event, those lessees shall pay to the city all costs incurred by the city in the acquisition of the relevant planned development within the development including but not limited to appraisal costs, costs of publication, and survey, and the department is authorized to take whatever action it deems necessary to collect the costs; and provided further that in case of a wilful breach of the purchase agreement, the city shall be entitled to any available remedy, including the sale of its interest in the planned development.

Sec. —4.4. Qualification for purchase. (a) No sale of any leased fee interest in land under a residential planned development land shall be made unless the lessees:

(1) Are at least eighteen years of age and are owner-occupants of their residential planned units;

(2) Are bona fide residents of the city and county of Honolulu;

(3) Have legal title to, or pursuant to an agreement of sale an equitable interest in a planned unit development situated on the leased property applied for; provided that for purposes of this section, the vendor under such agreement of sale shall not be eligible to purchase that property. An "agreement of sale" means an executory contract for the sale and purchase of real property which binds one party to sell and the other

party to buy property which is the subject matter of the transaction;

(4) Do not own property in fee simple lands suitable for residential purposes within the city and county of Honolulu or have pending before the State housing finance and development corporation, or the city department of housing and community development an unrefused application to lease or purchase residential real property for dwelling unit purposes. A person is deemed to own lands herein if the person, the person's spouse, or both the person and the person's spouse (unless separated and living apart under a decree of a court of competent jurisdiction) own lands, including any interest in a land trust in the city and county of Honolulu;

(5) Submit a letter of credit, certificate of deposit, proof of funds, or approved application from any lending institution demonstrating that the lessees who are participating in the purchase of the fee interest will be able to pay the City promptly for the leased fee interests;

(6) Submit an application for the purchase of the leased fee interest in good faith, and in such form as is acceptable to the department; and

(7) Execute a contract for the purchase of the fee interest in such form as is acceptable to the department.

(b) In the event of a wilful breach of contract by the lessees of the residential planned development, the City may sell or assign its interest without respect to the requirements of this section.

(c) The department may require additional testimony or evidence under oath in connection with any application. The determination by the department of any applicant's eligibility under this part shall be conclusive as to all per-

sons thereafter dealing with the property; provided that the making of any false statement knowingly by applicants or other persons in connection with any application shall constitute perjury and be punishable as such.

(d) The department shall adopt rules under Chapter 91, Hawaii Revised Statutes, to effectuate the purposes of this section.

Sec. —-4.5. Deposits by lessees. (a) The department may require the submission of a deposit by lessees seeking to purchase the leased fee interest in their planned development housing unit pursuant to this Chapter. The amount of the deposit shall be established by rule.

(b) The deposit may be applied by the department to payment of appraisal, survey, attorney fees, administrative costs, and any other costs the department has incurred as a result of the designation, with the remainder of the deposit to be applied toward the purchase of the owner's fee interest. The department shall incur no liability for the deposits under this section.

Sec. —-4.6. Preliminary negotiation required. (a) Upon the filing of a petition by the lessees with the department, the department shall request the lessor and the lessees to negotiate the just compensation which the lessees will pay to the lessor to acquire the lessor's interest in the development. If no agreement is reached within sixty days after the request to negotiate, the parties shall simultaneously exchange written final offers together with any appraisals, other documents, and any other expert opinions on which their negotiating positions were based. Copies of the final offers and related documents shall be submitted to the department and the department may use the information in determining, prior to commencing condemnation proceedings, the probability that the lessees will be able to meet the financial requirements of section —-4.4(5).

(b) This preliminary negotiation shall be in advance of and shall not constitute any part of any action in condemnation or eminent domain.

Any offers, appraisals, other documents, or any other expert opinions giving a value of the lessor's interest in the land beneath the planned development, which were prepared by a party for use in preliminary negotiations as provided for in this section, for setting qualifications amounts pursuant to section —-4.4(5) or for negotiations to determine the just compensation after designation to acquire the lessor's interest in the development and were not prepared for use in the trial, shall not be discoverable, usable, or admissible by an opposing or adverse party in any action, suit, or proceeding brought under this Chapter.

Sec. —-4.7. Eminent domain trial. The parties to the eminent domain action brought under this Chapter shall be the City as plaintiff and the lessees, lessors, landowners and all other necessary parties as defendants. All parties shall be given an opportunity to present evidence of the fair market value of the leased fee interest being acquired.

ARTICLE 5. EMINENT DOMAIN.

Sec. —-5.1. Applicability. This article applies to developments which are created by condominium property regimes under Chapter 514A, Hawaii Revised Statutes, and to developments existing under cooperative housing corporation status, and to residential planned developments not covered by Chapter 516, Hawaii Revised Statutes.

Sec. —-5.2. Exercise of power of eminent domain. Within twelve months after the designation of the development or portion thereof for acquisition, the department shall facilitate the acquisition of the leased fee interest in the land beneath the development by the city and county of Honolulu through voluntary action of the parties, or the institution of eminent domain proceedings to acquire the leased fee interest or portion thereof so designated. If the leased fee interest is not acquired or eminent domain proceedings are not instituted within the twelve-month period, the city shall reimburse the fee owner, the lessor, and the legal and equitable owners of the land so designated for

actual out-of-pocket expenses they incurred as appraisal, survey, and attorney fees as a result of the designation.

Sec. —-5.3. Compensation. The compensation to be paid for the leased fee interest shall be the current fair market value of the leased fee interest. The compensation shall be determined as of the date of the summons of the complaint in eminent domain.

Sec. —-5.4. Interest acquired. (a) Upon acquisition of a development or portion thereof as provided in this artcle, the property interest acquired by the City is all of the right, title, and interest of the fee owner, and of the lessor and fee owner and all legal and equitable owners, if any besides the lessor, in and to the development or portion thereof acquired, subject to all covenants, conditions, easements, reservations, and restrictions of record running with the land or contained in the agreement of sale, deed, or other conveyance held by the fee owner, lessor, and legal and equitable owners or permitted or suffered by lessees of existing residential condominium or cooperative housing corporation leases, which are not inconsistent with the intent of this article. The acquisition terminates all the right, title, and interest of the fee owner, lessor, and all legal and equitable owners, whether such interest be a remainder, vested or contingent, a reversion, or other beneficial interest in the property, present or prospective.

(b) If the apartment lease, condominium conveyance document, or proprietary lease is subject to any leasehold mortgage, lien, or encumbrance suffered or permitted by the lessee, including, but not limited to, rights arising through divorce, marriage, or assignment, the purchase of the leased fee by the lessee in no manner shall affect or impair such mortgage, lien, or encumbrance or the security afforded thereby to the holder thereof, and the leasehold shall continue, notwithstanding the purchase of the leased fee by the lessee, for the purpose and to the extent neces:ary to avoid any impairment of the leasehold se-

curity, unless the holder of the leasehold mortgage, lien, or encumbrance in writing consents to the transfer thereof to the fee and merger as provided in this Chapter. Upon written consent by the holder thereof, each leasehold mortgage, lien, or encumbrance to which the apartment lease, condominium conveyance document or proprietary lease is subject and to which the consent refers shall be transferred to and shall bind the fee acquired by the lessee, and thereafter shall continue in full force and effect as a mortgage, lien, or encumbrance of the fee acquired by the lessee, in the same order and priority among such mortgages, liens, and encumbrances so transferred to the fee as the same applied to and bound the lessee's immediate, previous leasehold interest.

Sec. —5.5. Interest in compensation paid by the City. The lessor, the fee owner, and all legal and equitable owners shall share in the compensation paid by the City as their respective interest shall appear. Notwithstanding any provision to the contrary in any contract or lease, a developer or other person entitled to share in the lease rentals shall share in the compensation paid by the City to the extent of the person's interest as may be determined by agreement of those entitled to share in the compensation paid by the City and in the absence of such agreement pursuant to Chapter 658, Hawaii Revised Statutes.

Sec. —5.6. Compulsory or involuntary conversion. It is the intent of the council, within the meaning of section 1033 or section 1231 of the Internal Revenue Code or the applicable provisions of Chapter 235, Hawaii Revised Statutes, as well as all other statutes, rules, regulations, administrative orders, and legal interpretations within the federal and state governments relating to taxation, that any conveyance of title to property by a fee owner to the City under this part shall constitute a compulsory or involuntary conversion, as a result of the exercise of the power of condemnation or the threat of imminence thereof, and that the fee owner shall not, by reason in whole or

in part of any provisions of this Chapter or by reason of the execution by the fee owner of leases to the property and other properties subsequent to the date of approval of this Chapter, be deemed to hold the property primarily for sale to customers in the ordinary course of trade or business.

ARTICLE 6. REVOLVING FUND.

Sec. —6.1. Fee simple condominium and cooperative and planned unit development revolving fund. A fee simple condominium and cooperative and planned unit development revolving fund is hereby created. The funds appropriated for the purposes of this Chapter and all moneys received or collected by the department of housing and community development under this Chapter shall be deposited in the revolving fund. The proceeds in the fund shall be used for the necessary expenses of the department, including administration, under this Chapter. All interest earned on moneys deposited by lessees into this revolving fund shall accrue to the lessees."

SECTION 3. If any article, section, sentence, clause, or phrase of this Chapter, or its application to any person or transaction or other circumstances, is for any reason held to be unconstitutional or invalid, the remaining articles, sections, sentences, clauses, and phrases of this Chapter, or the application of this Chapter to other persons or transactions or circumstances, shall not be affected. The council hereby declares that it would have passed this Chapter and each article, section, clause, or phrase thereof, irrespective of the fact that any one or more articles, sections, sentences, clauses, or phrases of this Chapter, or its application to any person or transaction or other circumstance, be declared unconstitutional or invalid.

SECTION 4. This ordinance shall take effect on January 1, 1992.

INTRODUCED BY:

John Henry Felix

_____

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_____

_____

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_____

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_____

Councilmembers

DATE OF INTRODUCTION:

December 28, 1990
Honolulu, Hawaii

APPROVED AS TO FORM AND LEGALITY:

_____

Deputy Corporation Counsel

APPROVED this _____ day of _____, 1991.

_____

FRANK F. FASI, Mayor
City and County of Honolulu

APPENDIX G

CITY AND COUNTY OF HONOLULU

Adoption of Rules for
Residential Condominium, Cooperative and Planned
Development Leasehold Conversion

September 28, 1993

1. Rules for Residential Condominium, Cooperative and Planned Development Leasehold Conversion are adopted to read as follows:

* * * *

DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT
CITY AND COUNTY OF HONOLULU
STATE OF HAWAII

RULES FOR RESIDENTIAL CONDOMINIUM, COOPERATIVE AND PLANNED DEVELOPMENT LEASEHOLD CONVERSION

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§ 1-2 Definitions
§ 1-3 Authority of department
§ 1-4 Severability
§ 1-5 Investigations
§ 1-6 Collection of information
§ 1-7 Dissemination of information
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§ 1-9 Burden of proof; oaths; affidavits
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§ 2-4 Qualifications of applicants

§ 2-5 Review of applications; preliminary approval

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§ 2-8 Negotiation by fee owners and approved applicants

§ 2-9 Estimated costs

§ 2-10 Initial deposit; final approval of applicants

SUBCHAPTER 3 CONDEMNATION; WITHDRAWAL; SUBSTITUTION

§ 2-11 Condemnation

§ 2-12 Withdrawal

§ 2-13 Substitution

SUBCHAPTER 4 ADDITIONAL DEPOSITS; SUBSEQUENT APPLICANTS

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SUBCHAPTER 5 PAYMENT; TRANSFER OF TITLE

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§ 2-17 Acquisition by City

§ 2-18 Sale by City to applicants

§ 2-19 Failure of applicant to pay under private agreement

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SUBCHAPTER 3 CONDEMNATION; WITHDRAWAL; SUBSTITUTION

§ 4-11 Condemnation

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SUBCHAPTER 4 ADDITIONAL DEPOSITS; ADDITIONAL APPLICANTS

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CHAPTER 1

RULES OF GENERAL APPLICATION

§ 1-1 *Applicability.* These rules shall apply to all lands in the City and County of Honolulu on which are situated residential condominium projects created under Chapter 514A, HRS, cooperative housing developments and planned developments, whether the lands are owned or held privately, owned or held by the State of Hawaii or the City, except Hawaiian Home Lands, subject to Article XII of the Constitution of the State or owned or held by the Federal government.
(Eff: Oct. 9, 1993) (Auth: ROH § 38-1.8(a) (Imp: § ROH 38-1.3)

§ 1-2 *Definitions.* The following terms used in these rules are defined as stated below, unless otherwise clear from the context.
(Eff: Oct. 9, 1993) (Auth: ROH § 38-1.8(a) (Imp: ROH § 38-1.2)

"Administrative costs" means expenditures which are not allocable to a specific project but which are expended to administer the leasehold conversion program overall, including, but not limited to, equipment and City and County of Honolulu support staff salaries and benefits.

"Agreement of sale" means an executory contract which states the terms of the sale and purchase of real property which binds one party to sell and the other party to buy an interest in specific land.

"Allocated costs" means the total of Direct Costs and Administrative costs.

"Association of apartment owners" has the same meaning as defined in Chapter 514A, Hawaii Revised Statutes.

"City" means the City and County of Honolulu.

"Condominium" means a residential apartment, together with its appurtenant undivided interests in common ele-

ments and limited common elements, located on land subject to a declaration of condominium property regime as defined in Chapter 514A, Hawaii Revised Statutes, used, occupied, developed, devoted, intended or permitted to be used or occupied as a principal residence for a single family but shall not include apartments used for commercial purposes or as time share units or as a transient vacation unit as defined under Chapter 21A, Article 9, Revised Ordinances of Honolulu.

"Condominium owner" means owner occupants of a condominium unit.

"Condominium property regime" means a condominium property regime project established under Chapter 514A, Hawaii Revised Statutes.

"Cooperative" means a residential apartment held, owned or leased by a cooperative housing corporation, and shall not include apartments used for commercial purposes, or as time share units or as transient vacation units.

"Cooperative development" means an area of land, irrespective of size, leased by a fee owner to a cooperative housing corporation and subleased to cooperative owners for their residential use.

"Cooperative owner" means the owner of a cooperative residential apartment.

"Cooperative housing corporation" means a corporation organized pursuant to the requirements stated in the appropriate sections of the Hawaii Revised Statutes and which is defined in § 519-3(d)(1), Hawaii Revised Statutes, or Chapter 421H, Hawaii Revised Statutes, and which conforms to the requirements of § 216 of the Internal Revenue Code of 1986, as amended.

"Department" means the City and County of Honolulu, Department of Housing and Community Development.

"Development" means an area of land, irrespective of size, which is subject to a declaration of condominium

property regime pursuant to Chapter 514A, Hawaii Revised Statutes, which contains or is intended to contain ten or more condominiums occupied or to be occupied under apartment leases or condominium conveyance documents.

"Direct costs" means expenditures attributed to a specific project, including, but not limited to, professional fees, notice publication expense, escrow charges, appraisers' fees, and court costs.

"Director" means the director of the department.

"Estimated costs" means the total of the price to be paid to acquire the leased fee interest estimated by the director and the allocated costs.

"Fair market value" means the amount of money that a purchaser willing, but not obliged, to buy land or an interest in land, would pay to an owner willing, but not obliged, to sell the land or interest in land in an open market, taking into consideration all uses to which the land is adapted or might in reason be applied.

"Fee owner" means the person who owns the fee simple title to the land leased by an apartment lease, condominium conveyance document or proprietary lease, and the heirs, successors, legal representatives and assigns of that person.

"HRS" means the Hawaii Revised Statutes.

"Lease" means the conveyance of land or an interest in land by a fee simple owner as lessor to a lessee or sublessee; or by any other person or sublessor to any person, in consideration of payment of rent or other recompense; or a ground lease from a fee owner to a cooperative housing corporation and not a lease or sublease to a cooperative owner.

"Leased fee" and "leased fee interest" mean reversionary interests of the fee owner, lessor, and all legal and equitable owners of land which is leased, except a lessee's or sublessee's interest.

"Legal and equitable owners" means the fee simple owner and all persons having legal or equitable ownership interests in the leased fee or in the lessor's leasehold estate, including mortgagees, developers, sublessors, lienors, and their respective heirs, successors, legal representatives and assigns.

"Lessee" means a natural person to whom land is leased or subleased, including the person's heirs, successors, legal representatives and assigns, and who is also concurrently the owner-occupant of a residential condominium; or a natural person who is an owner-occupant of a cooperative and the person's heirs, successors, legal representatives and assigns; or a natural person who is the owner-occupant of a unit in a planned development.

"Lessor" means any person who leases or subleases land to another, and the person's heirs, successors, legal representatives and assigns.

"Owner-occupant" means any individual in whose name sole or joint legal title is held in a residential condominium unit or planned development apartment or home which serves concurrently with such ownership as the individual's principal place of residence for a continuous and uninterrupted period of not less than one year immediately preceding an application for conversion, as well as during the legal proceedings to acquire the fee simple title. An owner-occupant must retain complete possessory control of the condominium unit or planned development apartment or home throughout these periods and shall not be deemed to have complete possessory control if the condominium unit or planned development apartment or home is rented, leased or assigned for any period of time to any other person who is not a legal owner, or an equitable owner under an Agreement of Sale, of the same condominium. The department may consider exceptions to the occupancy requirement based only on serious illness, employment requirements, military obligations, and educational sabbatical.

"Owner-occupant-shareholder" means any person who is a sole or joint owner of shares of a cooperative housing corporation or trust and leases a cooperative apartment, which concurrently with the individual's status as a shareholder, serves as the individual's principal place of residence continuously for a period of not less than one year immediately prior to the application for conversion as well as during the period of legal proceedings to acquire the fee; provided that the individual shall retain complete possessory control of the apartment during these periods. An owner shall be deemed not to have complete possessory control of the apartment if it is rented, leased or assigned for any period of time to any other person. The department may consider exceptions to the occupancy requirement based only on serious illness, employment requirements, military obligations, and educational sabbatical.

"Planned development" means a residential housing development project, also known as a cluster housing development or planned unit development, in which the apartment or homeowner has a leasehold interest in the underlying land; provided however, this definition shall not include any housing project which is registered as a condominium under Chapter 514A, HRS.

"Planned development owner" means owner occupants of a planned development apartment or home.

"Proprietary lease" means a lease or sublease by a cooperative housing corporation to a cooperative owner.

"RCH" means the Revised Charter of Honolulu, 1992 edition.

"ROH" means the Revised Ordinances of Honolulu 1990.

The terms "lessor," "lessee," "fee owner" and "legal and equitable owner" include individuals, both male and female, and, except as to the term "lessee", corporations, partnerships, associations, trusts, estates, the State of

Hawaii and the City and County of Honolulu. When more than one person or entity is included in any such designation, the terms shall apply to all of them, jointly and severally.

§ 1-3 *Severability.* If any rule or part of any rule stated in these rules is determined to be invalid, illegal, or unenforceable, that determination shall not affect the validity, legality, or enforceability of the remaining rules unless that effect is made impossible by the absence of the omitted rule or portion of a rule. (Eff: Oct. 9, 1993) (Auth: ROH § 38-1.8(a) (Imp: ROH § 38-1.8(a)

§ 1-4 *Authority of the department.* The department may employ attorneys, accountants, appraisers, surveyors, hearing officers, investigators and other persons as required, and may do all things necessary and convenient to implement and enforce Chapter 38, ROH and these rules. The director may delegate to any person, specific authority and responsibility for assigned duties and tasks. (Eff: Oct. 9, 1993) (Auth: ROH § 38-1.8(a) (Imp: ROH § 38-1.8(i)

§ 1-5 *Investigations.* The director shall conduct an investigation of any written complaint or situation which indicates a possible violation of Chapter 38, ROH or of these rules. The director is authorized to examine the books, accounts, records and files of any person connected with the matter under investigation, and may conduct hearings regarding any matter under investigation. If the director finds any violation, the director may order the responsible parties to cease and desist from continuing the violation, and if necessary the director may bring a civil action in the name of the City in any court of competent jurisdiction for the enforcement of the orders. (Eff: Oct. 9, 1993) (Auth: ROH § 38-1.8(a) (Imp: ROH § 38-1.8(e)

§ 1-6 *Collection of information.* From time to time, the director shall require all lessors, fee owners and other

owners of legal or equitable interests in the leased fee of residential condominiums, cooperative housing developments and residential planned developments to provide such information as may be reasonably required for the administration and enforcement of Chapter 38, ROH and these rules. (Eff: Oct. 9, 1993) (Auth: ROH § 38-1.8 (a) (Imp: ROH § 38-1.8(h)

§ 1-7 *Dissemination of information.* The director shall disseminate information and render assistance to lessees of residential condominiums, cooperative housing developments and residential planned developments, in order that Chapter 38, ROH and these rules may be understood and effectively implemented. (Eff: Oct. 9, 1993) (Auth: ROH § 38-1.8(a) (Imp: ROH § 38-1.8(d)

§ 1-8 *Contracts; documents; deeds.* The director shall determine the form and content of all documents necessary for the purposes of Chapter 38, ROH and these rules, including, but not limited to contracts, documents, application forms, and conveyance documents. The City shall convey its interest in any property acquired pursuant to Chapter 38, ROH by quitclaim deed. Any title insurance requested by buyers shall be paid for by the buyers. All closings and recordation shall be executed by a licensed escrow company. (Eff: Oct. 9, 1993) (Auth: ROH § 38-1.8(a) (Imp: ROH §§ 38-1.8(g); 38-1.9)

§ 1-9 *Burden of proof; oaths; affidavits.* The party having the burden of proof of any fact or event shall make such proof by competent and credible evidence and testimony acceptable and satisfactory to the director or his designated agent. Evidence at any hearing may be required to be given under oath or by sworn written material. An application may be required to be affirmed under oath. False oaths and affidavits shall constitute perjury and a violation of § 710-1060, HRS. (Eff: Oct. 9, 1993) (Auth: ROH § 38-1.8(a) (Imp: ROH §§ 38-2.4(c); 38-3.4(c); 38-4.4(c)

§ 1-10 *Revolving fund.* All moneys received or collected by the City or the department shall be deposited in the revolving fund created by Chapter 38, ROH. The department may invest the fund in a pooled investment to obtain the highest safe return. All interest earned on moneys paid by lessees shall accrue to the lessees. Provided, however, the department may pay costs incurred in the administration of the program from the earnings on the fund to reduce the amount assessed to the lessees. (Eff: Oct. 9, 1993) (Auth: ROH § 38-1.8(a) (Imp: ROH § 38-6.1)

CHAPTER 2

LEASEHOLD CONDOMINIUMS

SUBCHAPTER 1

PURPOSE; APPLICABILITY

§ 2-1 *Purpose.* The purpose of this chapter is to implement and enforce the provisions of Chapter 38, ROH relating to the conversion of leasehold condominiums to fee simple ownership. (Eff: Oct. 9, 1993) (Auth: ROH § 38-1.8(a) (Imp: ROH § 38-1.1)

§ 2-2 *Applicability.* This chapter shall apply to all developments which at the time of acquisition by the City are:

(a) Developed into condominium property regimes or occupied by residential lessees under leases or condominium conveyance documents executed before the effective date of Chapter 38, ROH; or

(b) Developed or partially developed into condominium property regimes occupied or to be occupied by residential lessees under apartment leases or condominium conveyance documents executed on or after the effective date of Chapter 38, ROH; provided that 90% of the leases to units in the development have been executed. (Eff: Oct. 9, 1993) (Auth: ROH § 38-1.8(a) (Imp: ROH § 38-2.1)

SUBCHAPTER 2

APPLICATION; DESIGNATION; NEGOTIATION

§ 2-3 *Application by lessees.* Condominium owners in a development may apply to the department on forms approved by the department to purchase their respective leased fee interests, together with an undivided leased fee interest equal to the percentage of common interest and limited common interest appurtenant to the condominium. Each applicant shall pay an initial deposit of $1000.00 at

the time of making the application by certified check, or such other means as determined by the director, payable to the City and County of Honolulu. The initial deposit shall be applied by the department in the manner stated in § 2-10, below. Not less than 25 condominium owners by number, or 50% of the condominium owners of a development, whichever shall be the lesser number, must apply as a condition precedent to the exercise of the power of eminent domain or the threat of eminent domain by the City. (Eff: Oct. 9, 1993) (Auth: ROH § 38-1.8(a) (Imp: ROH § 38-2.2)

§ 2-4 *Qualifications of applicants.* To be eligible to purchase a leased fee interest, an applicant shall:

(a) Be a bona fide resident of the City and County of Honolulu;

(b) Be at least 18 years of age and the owner-occupant of the condominium described in the application. Ownership shall include either legal title or the equitable interest of a purchaser under an Agreement of Sale;

(c) Own no other property in fee simple suitable for residential purposes within the city, or have pending before the State Housing Finance and Development Corporation or the department, any unrefused application to lease or purchase residential real property for dwelling purposes. This requirement shall apply to the applicant and the applicant's spouse jointly and severally, unless they are separated and living apart under a decree of a court of competent jurisdiction;

(d) As more specifically stated in § 2.10, below, demonstrate the ability to pay promptly and in full the estimated costs, at the time that the sale is to be consummated; and

(e) Execute a contract for the purchase of the leased fee interest from the City.

(Eff: Oct. 9, 1993) (Auth: ROH §§ 38-1.8(a); 38-2.4(d) (Imp: ROH § 38-2.4)

§ 2-5 *Review of applications; preliminary approval.* The director shall examine all applications and all supporting testimony, evidence and documents, and shall make a preliminary determination whether an applicant satisfies the requirements stated in sec. 2-4, above. All applicants shall be notified in writing whether they are approved or disapproved, and if disapproved, the reasons for disapproval. All applicants who are disapproved shall be allowed to submit additional testimony, evidence and documents as may be required for approval. (Eff: Oct. 9, 1993) (Auth: ROH § 38-1.8(a) (Imp: ROH § 38-1.8(i)

§ 2-6 *Public notice; public hearing.* After the review and preliminary approval of the required minimum number of approved applicants, the director shall give public notice of the request for designation of the development for acquisition of the leased fee by the City through the exercise of the power of eminent domain or by purchase under the threat of eminent domain. The notice shall also indicate the time and place of a public hearing to be held for the purpose of public discussion of the requested designation. The notice shall be published in a newspaper of general circulation in the City on at least three different days, the last publication being not less than five days before the date of the hearing. All interested persons shall be allowed to present oral and written testimony and evidence for or against the requested designation. (Eff: Oct. 9, 1993) (Auth: ROH § 38-1.8(a) (Imp: ROH § 38-1.8(i)

§ 2-7 *Designation of development for acquisition.* Following the public hearing, the director shall determine whether or not the acquisition of the leased fee interests in the development, or a portion of the interests, through the exercise of the power of eminent domain, or by purchase under the threat of eminent domain, and the disposition of such interests as provided by these rules, will effectuate the public purpose of Chapter 38, ROH. Writ-

ten notice of the decision shall be published once in a newspaper of general circulation in the City and copies shall be mailed to all approved applicants and all known lessors, sublessors, and other owners or holders of any legal or equitable interests in the leased fee at their respective addresses as shown on the real property tax records of the City and County of Honolulu. The notice shall include the names of the approved applicants, the identity of their respective condominiums, and the percentage of their leased fee interests. (Eff: Oct. 9, 1993) (Auth: ROH § 38-1.8(a) (Imp: ROH § 38-2.2)

§ 2-8 *Negotiation by fee owners and approved applicants.* Following the public hearing and the designation of the development for acquisition, the director shall request the fee owners and approved applicants to negotiate the just compensation to be paid for the leased fee. If the parties do not reach an agreement within 60 days following the request to negotiate, the director shall call a final negotiation meeting with notice to all parties. At the meeting, the parties shall exchange their best and final offers, together with all supporting appraisals, expert opinions, and other documents, and shall give copies to the director. The director may extend the time limit for negotiations, so long as the parties continue to negotiate in good faith, for a length of time that is deemed reasonable by the director, or as the parties agree. The parties shall pay for their own costs of negotiation including all fees of attorneys, accountants, appraisers and witnesses. The negotiations shall not be considered to be a part of eminent domain proceedings. The director may use the final offers, appraisals, expert opinions and other documents to assist in establishing an estimated cost of acquiring the leased fee. All offers, appraisals, expert opinions and other documents prepared for use by a party for negotiation purposes and not prepared for use in a trial shall not be discoverable, usable or admissible by an opposing or adverse party in any legal action, suit or proceeding.

(Eff: Oct. 9, 1993) (Auth: ROH § 38-1.8(a) (Imp: ROH § 38-2.6)

§ 2-9 *Estimated costs.* Following the negotiations, if no agreement is reached by the parties, the director shall establish an estimated price to acquire the leased fee, or a designated portion thereof, and all other legal and equitable interests of the development, together with the allocated costs. The estimated costs shall be divided among the approved applicants according to their percentage of the leased fee interests. The director shall notify all approved applicants in writing of their estimated costs. (Eff: Oct. 9, 1993) (Auth: ROH § 38-1.8(a) (Imp: ROH § 38-2.5)

§ 2-10 *Initial deposit; final approval of applicants.* Within 60 days following the receipt of the notice of estimated costs, all applicants shall:

(a) On forms approved by the department, submit an accurate and updated financial statement and letter of credit, certificate of deposit, proof of funds or loan commitment letter to verify the ability to pay the estimated costs. Evidence of other assets, eg. precious metals, coins, jewelry, stocks, bonds, may be submitted to determine the applicant's eligibility if they are acceptable to the department and the value claimed is verified by an independent appraiser;

(b) Pay to the department 50% of the allocated costs attributed to each applicant, after crediting the initial deposit paid as stated in § 2-3, above; and

(c) Re-affirm the contract to purchase the leased fee interest from the City.

Proof of ability to pay for the estimated costs may be waived for an applicant who has reached a settlement in which the fee owner agrees to finance the payment. However, all parties must agree to any such method of financing for any applicant.

Any applicant who fails or refuses to comply with the requirements of this section shall be disqualified from participating further, and shall be charged with a proportionate share of the allocated costs incurred by the department and the city to the date of disqualification. (Eff: Oct. 9, 1993) (Auth: ROH § 38-1.8(a) (Imp: ROH § 38-1.8(i)

SUBCHAPTER 3

CONDEMNATION; WITHDRAWAL; SUBSTITUTION

§ 2-11 *Condemnation.* If no agreement is reached by the parties by negotiation, the director shall request the corporation counsel to prepare and present to the City Council a Resolution for the exercise of the power of eminent domain for the condemnation of the legal and equitable interests of the fee owner, lessor, or equitable owner of the leased fee interest, and may request the appropriation of the funds necessary to pay the compensation for the leased fee interest. The director shall also request the corporation counsel to file the necessary legal action no later than 12 months after the designation of the development. If some of the applicants have reached an agreement with the fee owners, the Resolution and condemnation action shall relate only to the remaining applicants who have not reached an agreement. (Eff: Oct. 9, 1993) (Auth: ROH § 38-1.8(a) (Imp: ROH § 38-5.2)

§ 2-12 *Withdrawal.* Any applicant may withdraw from the designation for acquisition at any time before the City has initiated the eminent domain action to condemn the leased fee interest. Upon withdrawal, the applicant shall pay the department for the allocated costs incurred to the date of withdrawal. Withdrawal after the commencement of the condemnation action shall require the consent of the court, and the costs shall include in addition, the allocated share of all court costs and attorney's fees of the City as well as all fees and costs of the fee owners and other parties in the condemnation action, as

may be required by the court. Payment of the allocated costs and any other costs and fees shall be made by the forfeiture of the deposits of the withdrawing applicant. In the event there are insufficient funds in the deposits, the department shall have all legal recourse for the collection of the unpaid balance including civil lawsuits. (Eff: Oct. 9, 1993) (Auth: ROH § 38-1.8(a) (Imp: ROH § 38-1-8(i)

§ 2-13 *Substitution.* Any person who acquires the lease of an applicant may be substituted for the withdrawing applicant, provided that the substituted applicant meets all the requirements of Chapter 38, ROH and these rules, except the requirement that the substituted applicant be a resident of the condominium unit for a continuous and uninterrupted period of one year prior to the application. If the substitution occurs after the commencement of the condemnation action, it shall require the consent of the court. The director shall allow a substituted applicant a reasonable time to meet all the requirements for final approval. In the event there is no application for substitution within 60 days following a withdrawal, the director shall discontinue all efforts to acquire the leased fee interest of the withdrawing applicant and shall request the corporation counsel to dismiss the withdrawing applicant as a party to the condemnation action. (Eff: Oct. 9, 1993) (Auth: ROH § 38-1.8(a) (Imp: ROH § 38-1.8(i)

SUBCHAPTER 4

ADDITIONAL DEPOSITS; SUBSEQUENT APPLICANTS

§ 2-14 *Additional deposits.* The director may require all applicants to make additional deposits from time to time for the same purposes as the initial deposit, in such amounts as the director may determine to be reasonable and necessary to pay for the allocated costs. (Eff: Oct. 9, 1993) (Auth: ROH § 38-1.8(a) (Imp: ROH § 38-2.5)

§ 2-15 *Subsequent applicants.* Any owner-occupant of a condominium in the development who was not one of the initial applicants may apply and become an additional applicant until the date that the condemnation action is initiated, subject to meeting all the requirements of Chapter 38, ROH and these rules. Subsequent applicants applying separately from the initial application shall not be required to meet the minimum requirement of number of owners or percent of owners in a development stated in § 2.3, above. (Eff: Oct. 9, 1993) (Auth: ROH § 38-1.8(a) (Imp: ROH § 38-1.8(i)

SUBCHAPTER 5

PAYMENT; TRANSFER OF TITLE

§ 2-16 *Negotiated acquisition by applicants.* After the initial application all applicants who subsequently successfully negotiate an agreement to purchase their leased fee directly from the fee owner shall make their payments and receive title according to the terms and conditions of their private agreements, provided that they shall pay the department for the allocated costs incurred to the date of agreement. (Eff: Oct. 9, 1993) (Auth: ROH § 38-1.8(a) (Imp: ROH §38-2.6)

§ 2-17 *Acquisition by City.* The City may pay for all legal and equitable interests which the City acquires in the development from any legally authorized funds, or the City may arrange for a simultaneous acquisition and transfer to each approved applicant. (Eff: Oct. 9, 1993) (Auth: ROH § 38-1.8(a) (Imp: ROH § 38-5.4)

§ 2-18 *Sale by City to applicants.* Within 60 days following acquisition, the City shall sell the leased fee together with all other legal and equitable interests appurtenant to each condominium to the respective applicants. The sale price to each applicant shall be the cost of the particular leased fee plus a proportionate share of the ac-

tual amounts paid by negotiation or condemnation for all other legal and equitable interests, together with the allocated costs. The unused balance of any deposit shall be applied to the sale price of each applicant's unit. (Eff: Oct. 9, 1993) (Auth: ROH § 38-1.8(a) (Imp: ROH § 38-2.3)

§ 2-19 *Failure of applicant to pay under private agreement.* In the event of the failure of an applicant to perform according to the terms and conditions of a private negotiated agreement, the fee owners and other affected legal and equitable owners shall have recourse against the applicant according to the terms and conditions of the negotiated agreement and all applicable laws and remedies. The City and the department shall not be responsible for collection or receipt of any moneys from the defaulting applicant. (Eff: Oct. 9, 1993) (Auth: ROH § 38-1.8(a) (Imp: ROH § 38-1.8(i)

§ 2-20 *Failure of applicant to pay the city.* In the event the City has acquired the leased fee and all other legal and equitable interests appurtenant to a condominium and the applicant fails or refuses to pay the sale price as stated in § 2-18, above, the City shall have all the rights, remedies and recourse provided by law against the defaulting applicant, including civil actions and lawsuits. Upon the request of the fee owners, the director may negotiate terms, conditions and prices for a cancellation and rescission or a sale back to the fee owners. Notwithstanding such request, the director may at his discretion retain title in the City and sell the acquired interests to any other party by public auction or negotiated private sale. The defaulting applicant shall remain liable for the unpaid sale price stated in § 2-18, above, following any sale by the director. (Eff: Oct. 9, 1993) (Auth: ROH § 38-1.8(a) (Imp: ROH § 38-2.3)

§ 2-21 *Interest in compensation paid by the city.* Lessors, fee owners and all other owners of legal and equitable interests in a condominium shall share in the compen-

sation paid by the City as their respective interests shall appear. A developer or other party entitled to share in the lease rent shall share in the compensation to the extent of such party's interest. as may be determined by agreement among all parties entitled to share in the compensation. In the absence of agreement, the director is authorized by Chapter 38, ROH to apply to the First Circuit Court for an order compelling the parties to submit their claims to binding arbitration pursuant to Chapter 658, HRS. (Eff: Oct. 9, 1993) (Auth: ROH § 381.8(a) (Imp: ROH § 38-5.5)

APPENDIX H

LEASEHOLD CONVERSION OF CONDOMINIUMS AND COOPERATIVE HOUSING PROJECTS PHASE I

Prepared for:

Housing Finance and Development Corporation

Prepared By:

Ezra, O'Connor, Moon & Tam
DHM Planners Inc.
John Child & Co. Inc.
Peat Marwick Main & Co.

November 1987

INTRODUCTION

This study was prepared in response to 1987 House Resolution 380 (H.R. 380), "House Resolution requesting the Hawaii Housing Authority to address issues related to leasehold conversion of condominiums and cooperative housing projects." (See Appendix 1)

H.R. 380 requested answers to specific questions related to the property beneath condominiums and cooperative housing projects, and to report its findings to the Legislature 20 days prior to the convening of the 1988 Session.

In May 1987 the Housing Finance and Development Corporation (HFDC), formerly part of the Hawaii Housing Authority, sent out a Request for Proposal to fulfill the requirements of H.R. 380. The consultant team of Ezra, O'Connor, Moon and Tam; DHM Planners Inc.; John Child and Company Inc.; and Peat Marwick Main and Co. were selected to prepare the report.

H.R. 380 requested that interviews be conducted with individuals with varying interests in the lease to fee conversion issue. A list of the persons interviewed is contained in Appendix 2 of this report.

This report represents Phase I of the study and consists of (a) the findings of the interviews, (b) research on the leasehold conversion issue, (c) responses to questions in H.R. 380, and (d) conclusions and recommendations. HFDC grouped the questions into five different issue areas: General, Policy, Finance and Value, Legal and Tax. This report is organized according to this grouping.

EXECUTIVE SUMMARY

CONCLUSIONS/RECOMMENDATIONS

The research and findings of the interviews conducted as a part of this study indicate that there are primarily five areas of concern in the leasehold condominium and cooperative housing system. Proponents of mandatory conver-

sion legislation have raised these five areas of concern as objectives to be achieved by mandatory conversion legislation. They are:

1. Increasing fee simple home ownership
2. Breaking up the oligopoly of land ownership in Hawaii
3. Controlling lease rent
4. Freeing lessees from reversion of improvements provisions in surrender clauses
5. Increasing the number of fee simple condominium and cooperative housing units

The interviews and findings of available market data, which are discussed in detail in this study, do not suggest that a mandatory conversion law is the most effective means to obtaining the first four objectives. Some of these findings indicate:

—Condominium purchases have been dominated by non-owner occupants, and not by individuals seeking home ownership. Only 31%, or approximately 16,400 of the leasehold residential condominium units in Hawaii, were owner occupied in 1984-1985.

—The oligopoly of land ownership which characterizes the single-family residential leasehold ownership pattern is not completely analogous to the pattern of land ownership underlying condominium and cooperative housing projects. Therefore breaking up the oligopoly of land ownership in Hawaii is not a public purpose which could support mandatory condominium and cooperative fee conversion.

—89% or 415 of the landowners of the 754 condominium and cooperative projects in Hawaii own land under a single condominium or cooperative project.

—There is no market evidence to suggest that the pattern of renegotiated ground rents for condominiums and cooperatives is unreasonable. Since the late 1950s and early 1960s, the growth rates between original and renegotiated ground rents have been consistent with the growth of personal incomes, housing values and consumer prices over similar time periods.

—Voluntary fee conversion programs will provide no assurance that leasehold condominium and cooperative apartment owners will ultimately have the opportunity to purchase their leased fee, particularly in view of the severance damages arising from a sale of partial individual interests in the leased fee.

—A significant number of condominium and cooperative housing projects are scheduled for their first lease rental negotiations starting in 1990, and the ability to obtain long term fixed rate financing for leasehold condominium purchases will diminish as lease terms progress. Therefore, it is anticipated that motivations of lessees and lessors may change significantly as these negotiations draw closer, and that support for leased fee conversion relief will increase.

However, if a public purpose is to be identified as the basis for introduction of mandatory conversion legislation, then the fifth objective, increasing the number of fee simple condominium and cooperative housing units, could support the introduction of such legislation. Research indicates that on Oahu, where the majority of residential condominium and cooperative projects are located, 60% or 518 of the projects and over 70% or 53,898 of the units are leasehold.

So long as the Legislature determines that fee simple ownership of condominium and cooperative housing units is

a proper public purpose, mandatory condominium and cooperative fee conversion legislation should be upheld as a proper public use by a federal court following *Hawaii Housing Authority v. Midkiff* or a state court following *Hawaii Housing Authority v. Lyman.*

In order to afford the Legislature an opportunity to explore a full range of alternative approaches, it is recommended that Phase II of this study explore two different legislative alternatives:

1. To prepare draft legislation for mandatory condominium and cooperative fee conversions to require conversion of 100% of the leased fee interest under a condominium or cooperative project with a high minimum threshold of applicants. The method would appear to be the most equitable manner to implement a mandatory leased fee conversion process.

2. To prepare limited purpose legislation addressing three issues: rent control, reversionary or surrender clauses in apartment leases and the power of apartment owner associations and cooperative housing corporations to borrow and assess apartment owners to acquire leased fee interests.

The two alternative legislative proposals are recommended to provide the Legislature with a wide range of alternatives for their examination and consideration.

FINDINGS

General Issues

In 1987 there were approximately 69,300 units in 754 leasehold condominium, cooperative, planned development and cluster projects in the state of Hawaii. Approximately 51,572 units representing approximately 74.5% of all leasehold units were on land zoned for residential apartment use; 8.3% or approximately 5,725 units were on single-family residential-zoned land, and 15.6% or approxi-

mately 10,790 units were on mixed apartment/commercial, commercial or industrial zoned land.

Approximately 16,400 units representing 31% of the leasehold residential condominium units in Hawaii were owner occupied in 1984-1985. The highest owner occupancy rate is on Oahu, where nearly 16,000 units or about 34% of all residential units were owner occupied. The owner occupancy rate on the neighbor islands is considerably lower, between 2.9% and 11.5%, having a total of approximately 424 units which were owner-occupied.

In a sample of 66 leasehold projects, all the ground leases extend for at least 50 years, and typically for a term of between 55 and 75 years. By 2040, the leases for over 477 projects representing 75% of all existing projects will have expired. Approximately 57 of the 66 projects sampled, about 87%, have known rent periods ranging between 25 and 35 years. Approximately 56 of the leasehold projects sampled have renegotiated rent periods between 25 years and 40 years. The ground rents during the known and renegotiated rent periods are typically fixed in increments of 5, 10 and 15 years. Rent escalations during the known rent period range typically between 1.0% and 2.9% per year.

The leases for over 50 of the leasehold projects sampled provide for the renegotiated rents to be based on a stated rate of return on the fair market value of the land at the time of rent renegotiation. The rent renegotiation clauses for the remaining projects sampled provide for renegotiation based on fair market rent, a percentage of the rent paid to a master lessor, or rent increases based on the change in the consumer price index. The compound rate of growth between the original and renegotiated ground rents typically ranges between about 1.0% and 5.0% per year. Leases for about 59,200 units in 616 projects, about 90% of the leasehold units in Hawaii, provide for renegotiation of their ground rents between 1990 and 2015.

The median monthly ground rent for the urban Oahu projects sampled was approximately $0.084 per square foot of net apartment area. The monthly median ground rent for suburban Oahu projects sampled was approximately $0.038 per square foot of net apartment area.

As of the date of this study, lessors of 42 leasehold condominium projects (4,870 units) have voluntarily sold leased fee interests to apartment owners. Most of these sales occurred between 1984 and 1987. The participation rate of purchasers for the projects sampled ranges between 2% and 98%. Approximately 3.9% of all leasehold condominium units in Hawaii have been voluntarily converted.

There is no apparent correlation between the owner occupancy rate in a project and the participation rate in the lease to fee conversion. There is also no significant correlation between the length of the remaining fixed rent period and the lease to fee conversion participation rate.

Leasehold projects in Hawaii occupy approximately 1,920 acres. The largest concentration of leasehold condominium development, with 68% of the total (1,298 acres), is on Oahu. The median and mean lot areas are 38,480 square feet and 110,955 square feet, respectively. 577 projects (78%) are located on sites of three acres or less.

Policy Issues

The interviews conducted for this study and research into the background and legislative history of the mandatory conversion issue indicate that there are primarily five areas of concern in the leasehold condominium and cooperative housing system. Proponents of mandatory conversion have stated these areas of concern as objectives of mandatory conversion legislation. They are:

1. Increasing fee simple home ownership
2. Breaking up the oligopoly of landownership in Hawaii
3. Controlling lease rent

4. Freeing lessees from reversion of improvements provisions in surrender clauses
5. Increasing the number of fee simple condominium and cooperative housing units

The available market data collected for this study indicates:

- Non-owner occupants dominate condominium purchases, not individuals seeking home ownership. Approximately 16,400 or 31% of the leasehold condominium units in Hawaii were occupied by owners in 1984-1985.
- The average participation rate in voluntary conversion for non-owner occupants (54.8%) is greater than the average participation rate (32.9%) for owner occupants, a statistic which indicates that purchasers may be motivated by considerations other than the desire to own land under one's residence.[1]
- Ownership of land lease for condominium and cooperative projects in Hawaii is dominated by small landowners. Approximately 89% or 415 of these lessors own land under a single condominium or cooperative housing project.
- Condominium and cooperative apartment lessees have not yet experienced the significant lease rent increases experienced by single-family residential lessees. Very few condominium and cooperative lessors and lessees have renegotiated their lease rents as of this date. The few renegotiations that have occurred to date are based on annual compound rates of growth ranging from 1% to 5% of the original ground rents.
- Many lessees say that they were not informed about the reversion of improvements provisions in surrender clauses. They feel that the clause operates unfairly.

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[1] Based upon research of motivations of those who did and did not participate in voluntary conversions.

The available market data relating to leasehold condominiums and cooperative housing projects does not suggest that a mandatory conversion law is the best means to obtaining the first four objectives mentioned previously. However, if a public purpose is to be identified as the basis for introduction of mandatory conversion legislation, then the fifth objective, increasing the number of fee simple condominium and cooperative housing units, could support the introduction of such legislation.

Alternatives to address the first four objectives listed previously include:

1. Lease rent control legislation

2. Legislation to modify reversion of improvements provisions in surrender clauses

If increasing the number of fee simple condominium and cooperative housing units is the designated public purpose of mandatory conversion legislation, then there should not be any restrictions, such as owner occupancy or first time landownership, on participation in a mandatory conversion program.

Similarly, if the objective is to increase the number of fee simple condominium and cooperative housing units, then all types of residential condominiums and cooperative housing corporations should be included in a mandatory conversion program. The fee underlying the typical high rise condominium and cooperative housing corporation building, would be subject to conversion, as well as the fee underlying cluster developments, planned development housing, and mixed commercial/residential buildings.

If mandatory fee conversion is implemented, HFDC's primary role should be advisory and administrative. Enabling legislation could authorize HFDC to acquire leased fee interests on an interim basis, in order to transfer the leased fee interests to individual lessees; or to transfer the interests that are not purchased by individual lessees to a condominium association or cooperative corporation.

For condominium projects, a relatively high minimum percentage of lessees should be required to petition HFDC to initiate condemnation of the leased fee. HFDC should also be empowered to condemn 100% of the leased fee interest. It is also recommended that the association be required to purchase the leased fee interest of those lessees who are unwilling to purchase the fee at the time of conversion.

In the absence of a mandatory unanimous fee conversion requirement, the lessees who do not choose to participate in a fee conversion would continue to lease land underlying their units from the landowner, or they could lease from the condominium owners' association, or whoever purchases the leased fee.

A mandatory unanimous conversion would avoid the inequitable situation that would result to a lessor who would be left with a minority undivided remnant leased fee interest in a project or a building that remains beyond the term of the original lease.

For cooperative housing corporations, a lower minimum percentage (51%) of apartment owners should be required to petition the HFDC to initiate condemnation of the leased fee, but the corporation must purchase the entire leased fee. Since a cooperative has a single lease from the landowner, and the cooperative is organized as a corporation, a simple majority can and should be able to bind all apartment owners.[2]

* * * *

[2] Under general principles of corporate law, majority vote of the stockholders is sufficient to bind all stockholders unless the articles of incorporation on by-laws otherwise provide.

3. *Who owns condominiums and apartments in cooperative housing projects, transients or investors, and the age ranges of owners or stockholders?*

Based on the number of homeowner's exemption claims for real property taxes, approximately 31% of the leasehold residential condominium units (16,415 units) in the State of Hawaii in 1984-1985 were occupied by owners, as shown in Exhibit F.

The owner occupancy rate is highest on Oahu, at approximately 34% or nearly 16,000 of leasehold units. The owner occupancy rate on the neighbor islands ranges between 2.9% and 11.5%, substantially below the rate on Oahu. Neighbor island units are more likely to be located in resort areas and are often used for second home occupancy and resort rentals.

There were no owner occupants for condominium units classified as "Hotel" by their respective County Tax Offices.[1] Based on data for 1984, there were 5,218 leasehold condominium units in the State of Hawaii which were classified as being used for "Hotel" or short-term rental use, none of which were occupied by home owners. The distribution of these leasehold units by County is shown in Exhibit G.

* * * *

The data does not support the conclusion that there is an oligopoly of the ownership of land underlying condominium and cooperative projects. Thus a mandatory conversion law may result in a dilution of ownership of fee simple land underlying condominium and cooperative projects but would not break up any perceived oligopoly.

* * * *

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[1] Based on those leasehold condominiums with a 700 Pitt Code classification which denotes properties used for hotel purposes; actual uses may differ.

APPENDIX I

Mayor's Message No. 166

OFFICE OF THE MAYOR
CITY AND COUNTY OF HONOLULU

[STATE LOGO]

Frank F. Fasi
Mayor

December 16, 1991

Honorable Arnold Morgado, Jr., Chair
and Members of the City Council
City and County of Honolulu
Honolulu, Hawaii 96813

Dear Chair Morgado and Councilmembers:

Re: BILL 36 (1991), CD-2, FD-1, Relating to Lease Rent

BILL 156 (1990), CD-1, FD-1, Relating to Residential Condominium and Cooperative Leasehold Conversion for Real Property *Situated in the City and County of Honolulu*

Pursuant to the power vested in me by Section 3-203 of the City Charter, I am returning Bills 36 and 156 to the City Council unsigned.

I am taking this action because I firmly believe the issue of leasehold reform should be properly addressed at the State Legislature.

I fully support the positions expressed in these Bills for a cap on residential lease renegotiations and for a mandatory conversion of leasehold property under condominiums, but I do not want to give the State Legislature any further excuses for failing to act in this area.

The State Legislature has had the opportunity to correct these problems for years now, and it constantly finds excuses to put off making the hard decisions that must be made if we are to avert the coming social catastrophe when thousands of our State's residents find themselves on the street because they cannot afford the escalating lease rents.

These Bills and the coming lawsuit are going to provide the State Legislature with one more excuse to do nothing.

Based upon advice from the Corporation Counsel's office, I have some concerns over the ultimate constitutionality of these measures. The City has been informed by Bishop Estate that it will challenge both Bills 36 and 156 in court. I do not want to see the City paying Bishop Estate hundreds of thousands or possibly millions of dollars in legal fees as we did subsequent to Bill 81.

There are only three condominiums on Oahu that I know of that are coming up for renegotiation before September 1992. This would allow the State Legislature sufficient time to pass a law or laws correcting this problem.

This is why I am taking the action of returning Bills 36 and 156 to the City Council unsigned. I sincerely regret being forced to take this action, but I cannot in good conscience provide the State with any more excuses.

Sincerely,

/s/ Frank F. Fasi

APPENDIX J

Star-Bulletin Thursday, January 31, 1991 □ A-5

All 9 Council members reveal
conflict on condo/lease issue

Star-Bulletin staff

All nine members of City Council have disclosed conflicts of interest on the issue of leasehold condominiums.

Their reasons:

• John DeSoto said his wife is a co-tenant in a semi-revocable living trust which includes as an asset a leasehold condominium.

• Leigh-Wai Doo said he and his wife own a condominium on leased land at Pat's in Punaluu.

• John Henry Felix said he owns a leasehold condominium and his family owns the land under several condominium projects.

• Gary Gill said he owns the lease to a leasehold condominium, and relatives own land under a leasehold condominium building.

• Steve Holmes reported his wife owns the leasehold condominium where they live.

• Donna Kim said she sits on the board of directors for Honfed Bank, which does business with Bishop Estate —one of the state's largest owners of leased land.

• Rene Mambo said her immediate family owns a leasehold condominium.

• Andy Mirikitani reported he rents a condominium and owns several properties.

• Council Chairman Arnold Morgado said he owns a leasehold condominium, and Bishop Estate is his lessor.

APPENDIX K

LEASEHOLD CONVERSION PROJECTS—TO 1991

Project	First Made Available	No. of Units
Ilikai Marina	1975	261
Eden at Haiku Woods Incr A	1978	74
Makaha Valley Plantation	1979	572
Big Surf	1980	32
Rainbow Place	1981	90
Waikiki Parkway	1982	31
Kauhale Beach Cove	1983	40
Manoalani	1983	32
Alohalani Tropicana	1984	24
Kemoo by the Lake	1984	88
Makaha Valley Tower	1984	586
Holiday Manor	1984	225
Na Pali Gardens	1984	132
Consulate	1985	65
Kamaaina	1985	56
Ocean View	1985	24
Park Towers	1985	24
Princess Kealoha	1985	72
Punahou-Wilder	1985	30
Holiday Village	1985	238
Wilder, 1010	1985	42
Nuuanu 2033	1985	87
Sea View	1985	33
Makiki Holiday	1985	32
Parkview Apartments	1985	50
Scandia Towers	1985	42
Yacht Harbor Towers	1985	459
Aleo Hale	1986	44
Holiday Parkway	1986	71
Kalakaua 3019	1986	12
Maile Tower	1986	24
Pearl Ridge Terraces	1986	108
Punahala Apartments	1986	49
Punahou Garden Apartments	1986	189

Project	First Made Available	No. of Units
Terrace Apartments	1986	24
Ala Wai, 1717	1986	283
Villa on Eaton Square	1986	458
Ala Wai Manor	1986	91
Hono Hale Tower	1986	200
Victoria Plaza	1986	72
Kalakaua 2987	1987	41
Kalakaua 3056	1987	16
Kunia Terrace	1987	41
Four Paddle	1987	250
Makiki Tower	1987	136
Marina Tower	1987	108
Matlock Hale	1987	66
Terrace Towers	1987	73
Waipuna	1987	407
Century West	1987	351
Kinau 1040	1987	70
Mott-Smith Laniloa	1987	428
Nuuanu Park Place	1987	122
Ohualani	1987	27
Palo Alto	1987	29
Waikiki Imperial	1987	40
Hale O Pumehana	1987	70
Plumeria Hale	1987	66
Hale O Kalani Tower	1988	98
Kunia Gardens	1988	41
Maunaihi Terrace	1988	74
Oahu Surf I	1988	58
Olokele 855	1988	20
Punahou Chalet	1988	83
Wilder Regent	1988	40
Hawaiian Monarch	1988	439
Leolua Vista	1988	41
Makiki Royal	1988	44
Niihau Apartments	1988	44
Twenty One Hundred	1988	168
Victoria Mansions	1988	57
Ala Wai Plaza	1989	349

Project	First Made Available	No. of Units
Anga Roa	1989	40
Dowsett Point	1989	107
Ka Hale Mo'i I & II	1989	109
Kalakaua Sands	1989	54
King Manor	1989	115
La Casa	1989	102
Leolua Gardens	1989	41
Liliha Square	1989	137
Makani Kai Marina	1989	80
Nalanui Hale	1989	48
Ode Rancho	1989	65
Pacific International	1989	54
Pensacola Gardens	1989	68
Pleasanton	1989	49
Prospect 1011	1989	160
Sovereign	1989	48
Waimalu Park	1989	60
Wilder @ Piikoi	1989	166
Wilder, 1330	1989	71
Wilder-Keeaumoku Apartments	1989	26
Ala Wai Lani	1989	50
Ward Lanai	1989	28
Fairway Manor	1990	50
Makiki Iki	1990	30
Oceanside Manor	1990	18
Palms	1990	140
Royal Iolani	1990	296
Salt Lake, 3388	1990	16
Su Casa	1990	192
Ala Wai Plaza Skyrise	1991	206
Alexander, The	1991	72
Continental	1991	71
Craigside	1991	290
Diamond Head Vista	1991	173
Haiku Hale	1991	134
Harbor Shores	1991	42
Harbor Vista	1991	27

Project	First Made Available	No. of Units
Highlander	1991	204
Jason Apartments	1991	48
Kaahumanu Plaza	1991	54
Kahala Towers	1991	233
Kokea Gardens	1991	144
Lele Pono	1991	300
Makakilo Gardens Incr 1	1991	66
Makakilo Gardens Incr 2	1991	75
Makakilo Gardens Incr 3	1991	52
Makakilo Hale Incr 1	1991	93
Makakilo Hale Incr 2	1991	119
Makakilo Mala	1991	95
Makiki Apts	1991	20
Mauna Luan	1991	433
Mount Terrace	1991	126
Pauahi Gardens	1991	60
Pearl Manor	1991	40
Pearl Number One	1991	300
Plaza Hawaii Kai	1991	146
Ridgeway A	1991	37
Royal Court	1991	112
Sandalwood	1991	94
Scenic Towers	1991	127
Tiara Apartments	1991	30
Tropicana Village Makai	1991	68
Wilder House	1991	59
Yacht Club Terrace	1991	168
Yacht Club Knolls	1991	86
TOTAL: 137 projects		15,787 units

LEASEHOLD CONVERSION PROJECTS DATA

Year	No. of Units	Total No. of Units
1975	261	261
1976	261	261
1977	261	261
1978	74	335
1979	572	907
1980	32	939
1981	90	1029
1982	31	1060
1983	72	1132
1984	1055	2187
1985	1254	3441
1986	1625	5066
1987	2341	7407
1988	1207	8614
1989	2027	10641
1990	742	11383
1991	4404	15787

APPENDIX L

Councilman Arnold Morgado Jr., Chair
Honolulu City Council
Honolulu Hale—City Hall

December 4, 1991
4 PM Wed. 15 copies

Dear Chair and Council Members:

Re: Bill 156 (1990) CD-1 Relating to Residential Condominium and Cooperative Leasehold CONVERSION for Real Property Situated in the City and County of Honolulu and
Bill 36 CD-2 Relating to LEASE RENT

My name is Edie Hanohano Yomes, and I am Hawaiian. I, like my father Edward Hanohano and the rest of my family *OPPOSE* the above legislation.

Our family estate is located in Punalu'u, O'ahu where Pat's at Punalu'u restaurant and condominium and Hanohano Hale is now located. Pat's at Punalu'u has been a famous landmark for many years. It has been a hard long struggle for us to get to where we are. We have not borrowed or taken government loans. As a Hawaiian family that struggles to keep our AHUPUA'A land given to us many years ago intact, we urge you to listen.

This estate is not unique to these islands. Before the Great Mahele, Ahupua's lands were given to the people. Like few Hawaiian families now, the Hanohano's still own their original Ahupua'a.

My grandparents had a dream to keep their estate together. Ever since my father was in high school, this land helped my grandparent support 17 children and many hanai children. Years of labor were put into working this land. Now, since the passing of my grandparent, my family has stayed united to keep the estate.

When there was a need for housing in this area, we were able to fill that need. Two condominiums were built with a total of 254 units. There is only 10% owner occupancy and the rest are second homes, or rented to Hawaii residents and visitors. The restaurant also supplies local residents with jobs. These two condominiums now provide income that has helped my family start an aquaculture farm on that same estate. This aquaculture farm has also given jobs to local residents.

We are not self-centered in wanting to keep our land. We will share what we do with the community.

You, our law makers, will be liable for our future. Our land is our future. Should this legislation go through, the heritage that is so important to us as a Hawaiian Ohana will be lost. You will also be hurting many other people that own land and wish to have a future for their children. My family and many other families have worked hard to own something that can live forever. We must be able to continue living here and be able to afford to keep our land!

Please vote "NO" on this proposed legislation. Help us to keep our land. Let us be proud to belong to America—the land of equality and protection of individual rights . . . not mob rule!

I appreciate the time and opportunity to present this testimony and urge you to OPPOSE this legislation.

Mahalo,

/s/ Edie Hanohano Yomes
EDIE HANOHANO YOMES

Arnold Morgado, Chair
And Members of the
City Council
Honolulu Hale
Honolulu, HI 96813

Dec. 4, 1991
4 PM Wed. 15 copies

Chairman Morgado and Council Members:

Re: Bill 156 (1990) CD-1 Relating to Residential Condominium and Cooperative Leasehold CONVERSION for Real Property Situated in the City and County of Honolulu and
Bill 36 CD-2 Relating to LEASE RENT

My name is Wailani Sanborn Johansen. I am STRONGLY OPPOSED to this legislation affecting leasehold contracts. I am a small landowner who would face emotional and financial distress if the above legislation was passed. I, like many others, have a small condominium developed on property of which I am a lessor.[1] The majority of units are bought by investors from the mainland who in turn use them for vacation or rental units. To allow a few Hawaii residents, possible not even citizens, to force me to sell, or to allow forced conversion by those who own leasehold condominiums, period, from landowners like me at lower than going market rates would result in:

1—a "better-off" non-Hawaiian resident and,
2—a Hawaii resident WITHOUT HIS OR HER REAL HAWAII; by depriving them of what was once theirs—their "aina".[2]
3—a loss of local control of land, which control may never come back into island hands again.

I have a contract—a lease—with my lessees. This is something we have agreed in good faith to abide by. I may or may not wish to sell my land just as they may or may not wish to sell their condominium unit during the lease.

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1 My brother and I are the sole beneficiaries

2 Our family has owned this land for 200 + years.

I can tell you that because of great DEMAND for vacation or rental units, land values have gone up dramatically but this is NOT directly related to the type of unit ownership, whether fee or leasehold. The demand has been growing all along with the continued growth of Hawaii's tourism.

While the values have soared, I have had FIXED LEASE RATES. Why should I be further adversely affected by being FORCED TO SELL at below fair market values? WHO ARE YOU REPRESENTING—THE HAWIIAN RESIDENT SMALL LANDOWNER OR NON-RESIDENT INVESTOR?

Please think this through and you'll be convinced that by voting AGAINST this legislation you'll be doing what's best for the people of Hawaii.

Mahalo,

/s/ Wailani Sanborn Johansen
WAILANI SANBORN JOHANSEN

Councilman Arnold Morgado Jr. Chair
Honolulu City Council
Honolulu Hale—City Hall

December 4, 1991
4 PM Wed. 15 copies

Dear Chair and Council Members:

Re: Bill 156 (1990) CD-1 Relating to Residential Condominium and Cooperative Leasehold CONVERSION for Real Property Situated in the City and County of Honolulu and
Bill 36 CD-2 Relating to LEASE RENT

My name is Danna Keanu and I am over 30. Born and raised in Manoa Valley, I now reside in San Francisco, California. I went to California to go to college, married a local boy and decided to live on the mainland for various reasons.

When my mother told me what was happening and the problems the proposed legislation was creating, I was very upset and decided to lease my home there and come home and help the family.

We are a small family with a big job to do. Our family consists of my mother, 2 brothers, 1 sister, 1 neice and my husband and myself. I had been away for 11 years and so I was unaware of the problems they have been having.

My grandfather hanai'd my brother Tom and because he was lonely—he asked my mother if I could live with them also. Why I am telling you this is because I want to emphasize his thoughts as I remember when I lived with them. He would always say "Do not sell the land". If we bought new land, then it was OK to sell, but not the land that has been in the family for many many years. There are so few people who still have old lands today. If you allow this legislation to pass, you will be breaking

a cycle, a cycle of family, a cycle of commitment, a cycle of love which started when Hawaii was little villages, with happy and disease-free people and lots of aloha one for another.

Mahalo,

/s/ Danna Keanu
DANNA KEANU

Councilman Arnold Morgado Jr., Chair
Honolulu City Council
Honolulu Hale—City Hall

December 4, 1991
4 PM Wed. 15 copies

Honorable Chair and Council Members:

Re: Bill 36 CD-2 Relating to LEASE RENT

My name is KAMEHAMEHA MAERTENS and *I OPPOSE THIS LEGISLATION*. I live at 1425 Brigham Street and have been there for over 35 years. I come from a native Hawaiian family that has roots from the time King Kamehameha I ruled these islands.

The passing of such legislation only provokes the situation and would encourage an unfair taking from one family and giving it to other people who have *little roots* in Hawaii. This not only takes away our legal income, but it takes away our land value.

I urge you to HOLD THIS LEGISLATION. It will damage small landowners forever and may even cost lessees more than they think.

/s/ Kamehameha Maertens
KAMEHAMEHA MAERTENS
1425 Brigham St.

Councilman Arnold Morgado Jr., Chair
Honolulu City Council
Honolulu Hale—City Hall

December 4, 1991
4 PM Wed. 15 copies

Honorable Chair and Council Members:

Re: Bill 156 (1990) CD-1 Relating to Residential Condominium and Cooperative Leasehold CONVERSION for Real Property Situated in the City and County of Honolulu

In 1959 I built Laniakea Apartments at 369 Hobron Lane. It was completed May 1st, 1960. My family moved in first and business started June 1st, 1960.

In 1958 I married Kenneth Kaneapua. He passed away in 1965. I formed a family Incorporated, with each child having fifteen shares (5).

I oppose this legislation because:

1. The reasons for it are not true.
2. It is not fair that the government is taking away our property after so many years of providing the land for the lessees to use at bargain rates and us not even gettin a share of the profits they made by using our land.
3. My children have a right to the land as Hawaiians and heirs of the property. They should not be forced to lose it, just because someone else desires what is not theirs to begin with, if they do not want to sell.

Thank you,

/s/ Rose Kaneapua
ROSE KANEAPUA
Laniakea Apt.
President

Councilman Arnold Morgado Jr., Chair
Honolulu City Council
Honolulu Hale—City Hall

December 4, 1991
4 PM Wed. 15 copies

Honorable Chair and Council Members:

Re: Bill 156 (1990) CD-1 Relating to Residential Condominium and Cooperative Leasehold CONVERSION for Real Property Situated in the City and County of Honolulu and
Bill 36 CD-2 Relating to LEASE RENT

My name is Olive Miller.

I am against this legislation.

My family of three had to sacrifice many hardships, first to fill the coral land with dirt. Next came telephone, electricity, sidewalks and curbs shich took us years to pay up. I'd like to give my land to my daughter.

Thank you

/s/ Olive Miller
OLIVE MILLER

P.S. I'm ⅛ Hawaiian.

Councilman Arnold Morgado Jr., chair
Honolulu City Council
Honolulu Hale—City Hall

December 4, 1991
4 PM Wed. 15 copies

Honorable Chair and Council Members:

Re: Bill 156 (1990) CD-1 Relating to Residential Condominium and Cooperative Leasehold CONVERSION for Real Property Situated in the City and County of Honolulu and
Bill 36 CD-2 Relating to LEASE RENT

My name is Wilfred Paul. I OPPOSE THIS LEGISLATION.

I am a Keiki O Ka Aina and the property I own is located at 1914 University Avenue. On it is a building—constructed in 1960—with 42 condominium units with indenture of lease running to 2035.

This property was left to me by my mother upon her death in 1964, with a promise that I would not sell the land but would keep it for my children. I plan to keep this promise for my 3 children and 7 grandchildren. This land has been in our family for over 70 years.

My father purchased this piece of property in 1918.

The condominium is know as University Court.

The lawmakers trying to pass this bill have no right whatsoever to even think of such a discriminating and hurtful act!

Yours truly,

/s/ Wilfred H. Paul
WILFRED H. PAUL
4898 Kolohala St.
Honolulu HI 96816

Councilman Arnold Morgado Jr., Chair
Honolulu City Council
Honolulu Hale—City Hall

December 4, 1991
4 PM Wed. 15 copies

Honorable Chair and Council Members:

Re: Bill 156 (1990) CD-1 Relating to Residential Condominium and Cooperative Leasehold CONVERSION for Real Property Situated in the City and County of Honolulu and
Bill 36 CD-2 Relating to LEASE RENT

My name is Thomas H. Woolsey. I am of part Hawaiian descent. The land that my family has was bought and developed thru hard work. My grandfather, James K. Woolsey Sr. had worked long hours and risked losing everything in order to keep his first project on the board. He saved his money and bought materials to construct the first structure. He would sleep on planks of wood and sleep under a tarp to shelter him from the cold and rain. All this to save money for materials and a long term goal to provide a future for himself and his family.

In the late 50's he was approached to build high-rise apartments. It appeared that the Territory needed more affordable homes. The government approved of this leasehold at the time. No questioning, you build those homes for now and let those people have a shelter over them. You keep that land for your future, and your children's future, but for now we need that housing.

We, the Woolsey family, who gave these people a place to live, gave them a contract. The contract stated that the lease would expire on a certain date and the building, land and improvements done structurely, would be converted back to the Woolsey family. Also that a certain

amount would be payed to us each year, increasing in value over a certain period of time. A contract, a promise.

We are held to a promise also, that we are to keep the land, to establish a future for our Woolsey generation to follow. I understand that the people living in the units want to establish a future for their children; but must they trade my family's future? We're a God fearing family. We sacrificed. We don't want to sell or convert. We just want to keep a promise made by both parties; no stipulations, no deals. A contract is a contract. A contract is a promise.

I oppose this legislation because it is breaking a promise. A contract is a promise. Our government is based on a trust. A trust that we are bound to a piece of paper . . . a contract. Every law-maker should have read this contract . . . lawyer, doctor, housewife, teacher, your neighbors. This piece of paper is the Constitution of the United States. These people who are trying to go against us, as landowners, agreed and signed their contracts. If they read their contract, or if not, if they had someone to explain it to them, there would not be all this trouble.

I'm sure that these people are trustworthy people. I'm sure that they don't intentionally break a contract. What do you call this type of people? They read what a contract said and agreed to it, yet still believe that a contract can be broken.

Sincerely,

/s/ Thomas H. Woolsey
THOMAS H. WOOLSEY
2935 Oahu Avenue
Honolulu, Hawaii

APPENDIX M

Legislative Reference Bureau, Report No. 6, *Ownership Patterns of Land Beneath Hawaii's Condominiums and Cooperative Housing Projects*, 21 (1987)

Table 12

CONDOMINIUMS
HOLDERS OF FEE SIMPLE TITLE TO LANDS UNDER .25 PER CENT OR MORE OF ALL CONDOMINIUM UNITS, BOTH LEASEHOLD AND FEE SIMPLE, IN CITY & COUNTY OF HONOLULU (By Rank)

Rank	Owner Name	Units	Percent
1	Bernice Pauahi Bishop Estate	10,940	15.02478
2	Magoon Estate, Limited	1,520	2.08753
3	First Hawaiian Bank	1,165	1.59998
4	Liliuokalani Trust Estate	1,074	1.43793
5	Hawaiian Trust Co., Ltd.	1,036	1.44282
6	Kawaiahao Church et al.	1,019	1.39947
7	City and County of Honolulu	952	1.30745
8	James Campbell Estate	865	1.18797
9	James C. Castle Estate, et al.	774	1.06299
10	3900 Corporation	737	1.01218
11	Turieb, Limited	614	1.84325
12	Saje Ventures II	606	0.83226
13	Katherine K. Choy Trustees, et al.	600	0.82402
14	Iolani School	570	0.78282
15	Honolulu, Limited	568	0.78008
16	C. Robinson Limited Partnership	527	0.72377
17	Lum Yip Kee, Ltd.	516	0.70866
18	Queen Emma Foundation	469	0.64412
19	Roman Catholic Church-Hawaii	437	0.60016
20	Samuel M. Damon Trust Estate	436	0.59879
21	Hawaii Baptist Convention	428	0.5878
22	Hawaii Housing Authority	426	0.58506
23	Stark Development, Limited	417	0.57269
24	Shell Enterprise Co., Ltd.	381	0.52325
25	Hawaiian Resorts, Limited	369	0.50677
26	Honolulu Sailors' Home Society	368	0.5054

Rank	Owner Name	Units	Percent
27	Theodore H. Smyth, Trustee	363	0.49853
28	Bishop Trust Co., Ltd.	360	0.49441
29	Harry Weinberg	351	0.48205
30	American Trust Co. of Hawaii	348	0.46515
31	Bankers Life Insurance Co.-Nebraska	347	0.47656
32	Hawaiian Electric Co., Ltd.	347	0.47656
33	Tung Te Corp. et al.	347	0.47656
34	Axel Ornellas Trust	335	0.46008
35	Hawaii Conference Foundation	310	0.42574
36	Bali Land Corp.	298	0.40926
37	Agnes S.A.M. Sang	293	0.4024
38	Anna A. Neiman Trust	285	0.39141
39	Jack H. Ujimori	282	0.38729
40	Hanohano Enterprises, et al.	272	0.37355
41	St. Louis/Chaminade Ed Center	271	0.37218
42	Clarence O. Furuya, et al.	264	0.36257
43	Honolulu Federal Savings & Loan	261	0.35845
44	Alice H. Castle Trust Estate	254	0.34883
45	SBS Realty Corp.	247	0.33922
46	Church of Jesus Christ of LDS	239	0.32823
47	Floye G. Adams, et al.	228	0.31313
48	Thrift Guaranty Corp. - Hawaii	221	0.30351
49	Katherine M. Cooper, Trustee	219	0.30077
50	300 West 23rd Street Co.	211	0.28978
51	John H. Magoon, Sr. Trust Estate	209	0.28703
52	Hawaii National Bank, et al.	202	0.27742
53	Hirano Enterprises	200	0.27467
54	Kim Hyang Man/C.S., et al.	198	0.27192
55	KDI Investments, Inc.	197	0.27055
56	Indo Pacific Investment, Inc.	196	0.26918
57	McInerny Foundation, et al.	194	0.26643
58	Honolulu Myohoji	192	0.26368
59	Georgia C. Souza Trust Estate	190	0.26094
60	Yee Akin, Ltd.	186	0.25544
Totals		36,704	50.40858

Total number of owners in lease and fee: 17,882

Top 60 owners as a percentage of total number of owners in lease and fee: 0.33553

APPENDIX N

Modeling Long Term Impacts of a Hypothetical Residential Condominium Lease on Lessors and Lessees in Hawaii

by

Nicholas Ordway, J.D., Ph.D.
Hawaii Chair of Real Estate

April 1991

College of Business Administration
University of Hawaii
2404 Maile Way, Room B-201
Honolulu, Hawaii 96822

* * * *

Further research needs to be directed to the extent of the opinion, and calculations need to be made to estimate the impact of these opinions on the availability of future land supply.

3. *Macro-economic effects of placing a large number of units on the market suddenly*

Another major concern is the impact on our real estate markets if the state passes legislation mandating conversions of large numbers of leasehold condominium units to fee simple tenure. The probable timing and sequencing of condominium conversions is not presently known. We do not know if large numbers or small numbers of units will be placed on the market suddenly or over a longer period of time. Unlike the single family home conversions, which involved relatively small numbers at any one time, a sudden conversion of ten or fifteen condominium projects could put 5,000 units or more on the market in a period of a month or less. This could create a strain on our state's banking system. Further, once the lessors received the money, how will they invest it? It is very possible they will have to look to out-of-state investments, thus causing a net capital outflow in a state that already suffers from capital shortages.

There is uncertainty as to whether the system can or cannot adapt to the changes suggested in the previous paragraph. Consider the predictions made about the consequences of the Land Reform Act of 1967, before the U.S. Supreme Court validated the law. The late Chinn Ho was quoted as saying: "If the present law is declared constitutional, it is my firm conviction that residential real estate values on Oahu will go down 25 per cent. There is not enough money to sustain the price for such sale of land." (Krauss, 1976) This prediction was not validated, instead of falling, prices escalated after the Supreme Court's decision in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984). The fee simple properties

proved very attractive to offshore buyers who had access to external capital and resulted in a speculative bubble.

The macro-economic impacts of mandatory conversion have not been addressed and can only be guessed at today. Further research is recommended.

* * * *

HAWAII REAL ESTATE CENTER

[Logo]

RESEARCH & EDUCATION

April 10, 1991

The Honorable Mazie Hirono
House of Representatives
State of Hawaii
State Capitol Building
Honolulu, Hawaii 96813

Dear Representative Hirono:

Enclosed is a report on the residential condominium leasehold issue. This report is based on a request by your Committee, the Consumer Protection and Commerce Committee, and the Housing Committee last year.

Since no funding was associated with the request, it was necessary to produce this report from voluntary overtime. This, in part, explains why the report is ready now, rather than at the beginning of the legislative session.

Hopefully, the report will provide an objective and unbiased approach to the issue. We have been very careful to avoid making any policy recommendations that are more properly within the kuleana of your committee.

Respectfully submitted,

/s/ Nicholas Ordway
NICHOLAS ORDWAY, J.D., PH.D.
Professor and Chairholder
Hawaii Chair of Real Estate

Enclosure

cc: Representative Virginia Isbell
Dr. Albert J. Simone

HAWAII REAL ESTATE CENTER

[Logo]

RESEARCH & EDUCATION

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State of Hawaii
State Capitol Building
Honolulu, Hawaii 96813

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Respectfully submitted,

/s/ Nicholas Ordway
NICHOLAS ORDWAY, J.D., PH.D.
Professor and Chairholder
Hawaii Chair of Real Estate

Enclosure

cc: Representative Mazie Hirono
Dr. Albert J. Simone

FILED
JUL 6 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 97-1958

In The

Supreme Court of the United States

October Term, 1997

SMALL LANDOWNERS OF OAHU, AND RICHARD S. H. WONG, OSWALD K. STENDER, MARION M. L. LINDSEY, GERARD A. JERVIS, AND HENRY H. PETERS, in their capacities as Trustees of The Kamehameha Schools Bernice Pauahi Bishop Estate,

Petitioners,

vs.

CITY AND COUNTY OF HONOLULU,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DAVID Z. Y. ARAKAWA
Corporation Counsel
DAVID C. LAXSON
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(808) 523-4076

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Counsel for Respondent

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the holding in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984) that the "public use" requirement of the Fifth Amendment of the United States Constitution is "coterminous with the scope of a sovereign's police powers" is applicable to a local government's exercise of the eminent domain power assuring full, just compensation to landowners in order to address social evils threatening the local housing supply.

PARTIES TO THE PROCEEDING

The Petition accurately lists the parties to the proceeding.

RULE 29.6 STATEMENT

The City and County of Honolulu is governmental subdivision of the State of Hawaii and has no parent or non-wholly owned subsidiaries.

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STATUTES

Haw. Rev. Stat. Chapter 516 1

OPINIONS BELOW, JURISDICTION AND CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The City agrees with the Petitioners' identification of the Opinions Below, Jurisdictional Statement and Statement of Constitutional and Statutory Provisions Involved.

STATEMENT OF THE CASE

In the State of Hawaii, including the City and County of Honolulu, a significant portion of housing supply was developed and marketed "leasehold." This meant that the "buyer" of a home actually purchased a long term lease. The leases typically provided for a fixed low rent for an initial period followed by "renegotiations" at which rents would periodically be increased to "fair market value" until the lease's expiration when all rights to the land and improvements revert to the lessor.

This "leasehold" system of "home ownership" was extensive in Hawaii where land titles were concentrated in the hands of a relatively few landowners.

In order to deal with social ills associated with this widespread "leasehold home ownership" pattern, the Hawaii Legislature in 1967 enacted Haw. Rev. Stat. Chapter 516 which used the eminent domain power to effect "lease-to-fee conversion." Chapter 516 provided a process for State condemnation of the lessors' interests in leasehold housing and for the State to sell the fee simple titles to the lessees. In *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), this Honorable Court rejected the challenge by the then trustees of Bishop Estate (the current

trustees are Petitioners in this proceeding) to Chapter 516 under the Public Use Clause of the Fifth Amendment:

> The Court long ago rejected any literal requirement that condemned property be put into use for the general public. 'It is not essential that the entire community, nor even any considerable portion, . . . directly enjoy or participate in any improvement in order [for it] to constitute a public use.' [citation omitted] [W]hat in its immediate aspect [is] only a private transaction may . . . be raised by its class or character to a public affair. As the unique way titles were held in Hawaii skewed the land market, exercise of the power of eminent domain was justified. The Act advances its purposes without the State's taking actual possession of the land. In such cases, government does not itself have to use property to legitimate the taking; it is only the taking's purpose and not its mechanics, that must pass scrutiny under the Public Use Clause.

467 U.S. at 244.

In upholding Chapter 516, this Court recognized that (1) no expenditure of public funds was involved, "funds to satisfy the condemnation awards have been supplied entirely by lessees", 467 U.S. at 234; and (2) there was no change in the use of the property, because "lessees retain possession of the property for private use throughout the condemnation process." 467 U.S. at 243.

Although Chapter 516 applied only to single family homes, the leasehold system of home development, which grew out of the Hawaii land oligopoly, had extended to condominium developments as well. In 1987 more than 70% of all of the condominium units in the

City and County of Honolulu were "leasehold."[1] Although there were a total of 17,882 owners of fee simple title to at least one Honolulu condominium unit,[2] one of those owners, Petitioner Bishop Estate, alone controlled the fee title to 10,940 units. By the time the ordinance was approved, Petitioner Bishop Estate's fee ownership of Honolulu leasehold condominium units had gone up to 12,500 units.[3] In 1987, more than half of Honolulu's 53,898 leasehold units were controlled by twenty-four (24) lessors[4] and only sixty (60) owners controlled the fee simple title to more than 50% of all 73,000 condominium units in Honolulu, leasehold and fee simple.[5] Indeed, the breadth of the "leasehold system's" reach into Honolulu's economy is demonstrated by the fact that each and every city council member (including all of those who voted against Ordinance 91-95) disclosed conflicts of interest with respect to the Ordinance. (Petition at 24).

In the late 1980's and early 1990's, the Honolulu City Council recognized that the "leasehold" system of home

---

[1] A study performed for the Hawaii Legislature in 1987 concluded that "on Oahu, where the majority of residential condominium and cooperative projects are located, 60% or 518 of the projects and over 70% or 53,898 of the units are leasehold." Pet. App. 163a.

[2] Pet. App. at 192a.

[3] In their moving papers filed in the District Court, the Bishop Estate Trustees represented that they "owned the leased fee interest under approximately 12,500 condominium units at the time the ordinances were approved." (C.R. 28, page 8.)

[4] Pet. App. 191a.

[5] *Id.*

ownership presented serious potential problems for the county's housing supply and economy. Because buyers of leasehold condominiums ordinarily finance their purchases by mortgaging their leasehold interests, the passage of time presented the serious potential that owners of leasehold condominium units would soon be unable to sell their homes due to the unavailability of conventional financing. Hence, a 1987 study concluded:

> if there were no further lease to fee conversions, by 1990, 31% of the existing leasehold projects, or 21% of the existing leasehold units could become ineligible for 30-year commercial financing. Approximately 2% of existing leasehold projects, representing only 1% of existing leasehold units, would also then be ineligible for 15-year commercial financing.

(C.R. 8, Exhibit CC page xvii).

Obviously, as time went on, this problem affecting the resale market of a substantial portion of Honolulu's housing supply was going to become more and more severe. As the Hawaii State Legislature observed with respect to leasehold single family housing:

> residential leaseholds have also undesirable social effects. Lease rent negotiations are usually scheduled every 10 to 15 years after the initial fixed rent period of 25 to 30 years. Thus, as the lessee advances in age and his [or her] income potential declines, his [or her] lease rentals increase, causing him [or her] to give up the lease and look for other accommodations. Then, when the entire lease period expires, the lessee who has stayed on the leasehold for the full term of the lease is, by reason of age, income,

> and the lack of value remaining in the leasehold, left without means to purchase another home.

Housing Finance & Dev. Corp. v. Castle, 79 Haw. 64, 898 P.2d 576, 593 fn.10 (1995), quoting 1975 Haw. Sess. L. Act 184, at 408-29.

In 1990, the Honolulu City Council responded to public policy concerns regarding rapid escalation in lease rents, the same way that municipalities across the United States have responded: by enacting a rent control ordinance. Yet, because of the unique characteristics of Hawaii's pattern of "leasehold" development and sale of housing, the United States District Court for the District of Hawaii held the rent control ordinance unconstitutional. *Richardson v. City and County of Honolulu*, 759 F. Supp. 1477 (D. Hawaii 1991). The District Court's decision was based on a thorough analysis and application of this Honorable Court's decision in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984). 759 F. Supp. at 1494-5.

In 1991, still seeking to address the social problems stemming from Hawaii's leasehold condominium ownership, the Honolulu City Council enacted Ordinances 91-95 and 91-96.[6] The City Council's findings in support of Ordinance 91-95 included the following:

> The historical pattern of land ownership on Oahu has led to the practice of landowners leasing rather than selling their land. Ownership of land beneath residential condominium apartments, cooperative housing units and residential

---

[6] Ordinance 91-96 is a rent control ordinance which is the subject of a Cross-Petition for Certiorari.

> planned developments on Oahu is consistent with this pattern and is concentrated in the hands of the owners of such land who have refused to sell proportionate shares in their fee simple titles to such land to the lessees . . .
>
> Under the burden of increased lease rents, many owner-occupants of residential condominium apartments, cooperative housing units and planned development units, especially those on fixed incomes, have found, and will continue to find themselves unable to afford to continue living in their homes. If they are displaced from those homes, these owner-occupant lessees could be displaced entirely from the ranks of home-owners because of Oahu's continuing housing crisis. . . .
>
> These lessees have been forced to accept long-term leases or renewed leases of such land which contain terms and conditions that are financially disadvantageous to them, that restrict their freedom to fully enjoy such land and that are weighted heavily in favor of the landowners; or to surrender title to and possession of their residential condominium, cooperative and planned development homes at the expiration of their current leases.

Pet. App. 105a.

Ordinance 91-95 is narrowly tailored to address its public purposes. It grants the right of lease-to-fee conversion ***only to owner-occupants*** of Honolulu leasehold condominium units. The data before the City Council indicated that there were approximately 16,000 to 17,000 owner occupied leasehold units in Honolulu at the time the ordinance was enacted. Pet. App. 162a; *Richardson v.*

City and County of Honolulu, 759 F. Supp. 1477, 1493 (D. Hawaii 1991).

In the mid to late 1980's, after the Hawaii Legislature and City and County of Honolulu began contemplating lease-to-fee legislation (Petition at 24), as well as rent control legislation, some lessors of condominium units voluntarily sold their fee simple interests to condominium lessees in the face of pending legislation. Nevertheless, despite these "voluntary" sales, even at the end of 1991 the Petitioners concede that fully one-half of Honolulu's condominium units were still leasehold. (Petition at 7).

Petitioner Bishop Estate filed the instant suit in the U.S. District Court for the District of Hawaii immediately after Ordinance 91-95 was enacted. On cross-motions for summary judgment, the District Court upheld the constitutionality of Ordinance 91-95. The District Court again carefully considered and correctly applied the standard defined by this Court in *Midkiff*:

> Bishop Estate maintains that the ordinance is based on the incorrect assumption that a concentration of land ownership currently exists with respect to land leased for condominiums which is similar to the oligopoly which justified the Land Reform Act in the single-family home context. Bishop Estate contends that there is no concentration of land ownership in relation to leased land underlying condominium projects.
>
> The court finds no merit to this argument. The Supreme Court in *Midkiff* repeatedly emphasized the substantial deference which should be accorded to the relevant legislative body in the area of public use. 467 U.S. at

> 239-43, 104 S. Ct. at 2328-31. In the present case, the City Council determined that ownership of land beneath residential condominium projects is concentrated in the hands of owners who have refused to sell proportionate shares in their fee simple units. Ord. 91-95 Section 1. Thus, the City Council's primary concern was apparently the inability of the owners of leasehold condominiums to purchase proportionate shares of the underlying fee simple title. While the current concentration of land ownership with respect to leasehold condominiums may not be as drastic as the land oligopoly which prompted the Land Reform Act, this contention does not undermine the City's determination that permitting leasehold condominium owners to purchase the underlying property serves a legitimate public purpose.

The District Court also noted in a footnote that the record revealed a substantial level of concentration of ownership of fee simple title to leasehold condominium units:

> Nevertheless, the court notes that Bishop Estate's own filings reveal that in 1987 the land underlying 45% of the condominium projects in Hawaii was owned by only 51 lessors. . . . Furthermore, at the time Ordinance 91-95 was enacted, Bishop Estate alone owned the fee simple interest under approximately 12,500 of [Honolulu's] leasehold condominium units.

Pet. App. 70a n. 24.

On appeal, the Ninth Circuit Court of Appeals carefully applied the principles of *Midkiff* to Ordinance 91-95 and again upheld the ordinance:

> Here, as in *Midkiff*, the requirement of just compensation ensures that individuals will not be forced to bear public burdens, which in all fairness should be borne by the public as a whole. Heightened scrutiny is thus inappropriate. The language used throughout *Midkiff* indicates that deference to the legislative body's public use determination is required when the taking is fully compensated. *See, e.g., Midkiff*, 467 U.S. at 241, 104 S. Ct. at 2329-30 ("[W]here the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause.").
>
> . . .

Pet. App. at 13a.

The Court of Appeals recognized that under *Midkiff* the power to determine whether there is excessive concentration of ownership of condominium fees simple rests with the City Council, not with the court:

> The City determined that the price of condominiums was higher because the ownership of the fee simple titles to the land underneath the condominiums was excessively concentrated. While the hearings produced conflicting testimony, one study presented to the City showed that the largest 20 Landowners own 34.9% of the land under condominium units in Honolulu, and that the largest 60 own 50.4%. [citation omitted]. While the largest 20 landowners own a smaller percentage of land underneath condominiums than the largest 22 owned of the fee simple titles when the Court decided *Midkiff*, *see Midkiff*, 467 U.S. at 232, 104 S. Ct. at 2325, the concentration of ownership of land underneath condominiums

> is greater than the concentration of land ownership throughout the state at the time *Midkiff* was decided. . . . We thus cannot say that the City's finding is without reasonable foundation.

The Ninth Circuit Court of Appeals, applying this Honorable Court's legal standard articulated in *Midkiff*, thus held that Ordinance 91-95 was an appropriate exercise of the City's eminent domain power for an appropriate public purpose:

> Under the rational basis test, we hold that the Ordinance is constitutional under both the United States and Hawaii constitutions. Regardless of what has occurred with single-family dwellings, the City rationally could have believed that, if the supply of condominiums increased (through the lease-to-fee measure of Ordinance 91-95), the price of those condominiums would decrease. Additionally, although the price of single-family houses increased dramatically between 1987 and 1990, there is no indication that the price would not have gone up even more without the Act's lease-to-fee mechanism.

Pet. App. at 17a.

The Ninth Circuit also recognized the intensifying serious concerns for the county's housing supply if action is not taken.

> Finally even if the price of condominiums does not decrease as a result of the Ordinance, some of the public purposes of the Ordinance will be served. If a family is allowed to purchase its condominium, that family will not risk being thrown out of its home in 25 years because the family cannot afford the renegotiated rent. The City rationally could have concluded that the

> lease-to-fee mechanism would remedy defects in the housing market and stabilize Oahu's economy.

Pet. App. at 17a.

In footnote 5 of its Petition, Bishop Estate disingenuously attempts to belittle the above-quoted finding. The Ninth Circuit recognized one of the precise dangers which the leasehold system creates, and the instant legislation addresses: the concern that if a lessee cannot purchase his fee simple interest now, he may make mortgage (and lease-rent) payments for a number of years into the future until (perhaps after reaching retirement age) the lease-rent is "renegotiated" and becomes unaffordable to the "homeowner" whose housing options at that time may be non-existent. The Ninth Circuit recognized that Ordinance 91-95 alleviates this problem by enabling condominium "owners" to become actual homeowners while assuring that the lessors will receive "just compensation" for their rights.

REASONS FOR DENYING THE WRIT

There Is No Conflict Among The Circuits

The principle of this Court's *Midkiff* decision has been uniformly and properly applied. Even the Petitioners concede that the lower court's decisions applied the law consistently with the standards set forth in *Midkiff*. As the Petitioners acknowledge:

> Eminent domain is a policy option that applies only to a small subset of economic problems, and, even with respect to those problems, it is

> typically only one of many tools available to the government.

Pet. at 21.

Midkiff held that such takings satisfy the public use requirement:

> where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a ***compensated taking*** to be prescribed by the Public Use Clause.

467 U.S. at 241.

> Judicial deference is required because, in our system of government, legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power. State legislatures are as capable as Congress of making such determinations within their respective spheres of authority. See *Berman v. Parker*, 348 U.S. at 32, 75 S.Ct. at 102. Thus, if a legislature, state or federal, determines there are substantial reasons for an exercise of the taking power, courts must defer to its determination that the taking will serve a public use.

467 U.S. at 244.

The public purposes of Ordinance 91-95 are thoroughly set out in the legislative findings contained in Section 1. The City Council has identified a number of social problems stemming from the pervasive leasehold condominium system on Oahu and has developed a rational means of addressing these problems via lease-to-fee conversion. The public purposes include encouragement of home ownership rather than renting; reduction of the

likelihood that a significant portion of Honolulu residents who have made mortgage and lease payments for many years will be rendered homeless at the time when they reach retirement age and financially unable to purchase another home; reduction of the serious shortage of fee simple condominium and cooperative housing unit land; and elimination of artificial inflation in prices of fee simple condominium and cooperative housing unit land. Each of these public purposes is more than just "conceivable" as required under *Midkiff*. Rather, the public purpose in encouraging a free market in fee simple housing is a critical function of local government. The public purposes served by Ordinance 91-95 are similar, if not identical, to those recognized and upheld in *Midkiff*.

The applicable legal standard requires that Ordinance 91-95 be upheld as long as it has a rational relationship to the public purposes identified by the City Council. The Court is precluded from second-guessing the wisdom of the legislation or questioning the likelihood that it may succeed in achieving its public purposes:

> Of course, this Act, like any other, may not be successful in achieving its intended goals. But "whether *in fact* the provision will accomplish its objectives is not the question: the [constitutional requirement] is satisfied if. . . the . . . [state] Legislature *rationally could have believed* that the [Act] would promote its objective." [citations omitted]. When the legislature's purpose is legitimate and its means are not irrational, our cases make it clear that empirical debates over the wisdom of the takings – no less than debates over the wisdom of other kinds of

> socioeconomic legislation – are not to be carried out in the federal courts. Redistribution of fees simple to correct deficiencies in the market determined by the state legislature to be attributable to land oligopoly is a rational exercise of the eminent domain power. Therefore, the Hawaii statute must pass the scrutiny of the Public Use Clause.

467 U.S. at 242-3.

The Petitioners' takings claim, in essence invites the Court to create a dual standard for evaluation of ***compensated takings***. Thus, Petitioners ask this Court to create a new legal standard in which for some compensated takings the federal courts would have to become involved in heretofore prohibited "empirical debates over the wisdom of the takings" which will be effected by Ordinance 91-95. As this Honorable Court recognized in *Midkiff*, such "empirical debates" are not the appropriate function of the federal courts. Thus, it would be wholly inappropriate and unworkable for this Court to accept Petitioners' invitation to establish a new "heightened scrutiny" standard for evaluation of some eminent domain proceedings. The Court should not require the federal courts to entertain an evidentiary proceeding over whether or not the number of lessors is so concentrated as to justify the ordinance; whether inflation in prices of fee simple condominiums will be favorably effected by the ordinance or other questions about the wisdom of the ordinance. That debate properly took place at length before the City Council and *Midkiff* demonstrates that the debate is not subject to second guessing by this Court.

Ordinance 91-95 rationally addresses legitimate public concerns over Honolulu's housing supply. *Midkiff* teaches that the takings clause requires no more. Because there is no conflict among the Circuits on the standards defined by *Midkiff* and there are no other reasons to change *Midkiff*'s principles, the Petition for Certiorari should be denied.

Petitioners' Attempt To Distinguish *Midkiff* Fails

The Petitioners ask this Court to abandon *Midkiff* and create a new constitutional standard applicable to the exercise of the eminent domain power where the following three characteristics are present: (1) the alleged "lack of social surplus" due to the fact that the property will be used for housing before, during and after condemnation; (2) lack of public funds to pay just compensation; and (3) the legislative body exercising eminent domain power is a city government as opposed to a State Legislature. Petition at 14-18.

Petitioners have failed to provide any reasonable basis for adoption of a new constitutional standard. At best, the Petitioners have identified "distinctions without a difference" and on several of their points the petitioners cannot even identify a distinction from *Midkiff*.

"Social Surplus". The Petitioners assert that *Midkiff* should not apply where there is an "[a]bsence of a change in use of the property." Petition at 14-15. In other words, the Petitioners argue that "heightened scrutiny" should be adopted because the property which is the subject of condemnation was used for "housing" before the condemnation and is expected to continue to be used for

"housing" during and after the condemnation. Of course, this was exactly the situation in the *Midkiff* case, where this Honorable Court expressly recognized that "lessees retain possession of the property for private use throughout the condemnation process." 467 U.S. at 243. Thus, the fact that the property which is the subject of lease-to-fee conversion will continue to be used for housing after it is converted to fee simple housing provides no distinction at all from *Midkiff*.

Just Compensation Paid By Lessees. Under Ordinance 91-95, as in *Midkiff*, it is anticipated that the condemned property will be sold to lessees, thus accomplishing the "lease-to-fee conversion." Hence, the result under Ordinance 91-95 is expected to be precisely the same as this Court observed in *Midkiff*: "funds to satisfy the condemnation awards have been supplied entirely by lessees". 467 U.S. at 234. Once again, the Petitioners completely fail to identify any reason to deviate from the standard established in *Midkiff*.

Legislation Enacted By City Council. Petitioners next claim that lease-to-fee legislation passed by a city council elected by a community of approximately 1 million citizens is subject to a higher level of constitutional scrutiny than legislation passed by a State legislature. Legislation passed by Honolulu's legislative body is entitled to the same treatment as any other legislative body acting pursuant to State law. There is no constitutional distinction based on the number of members passing the legislation nor on the number of constituents they represent. *Midkiff* defines the constitutional standard for governmental use of the eminent domain power regardless of whether the

power is exercised by a City Council governing a population of 8 million or a State legislature elected from a population of 2 million citizens. Neither the size of the legislative body enacting challenged legislation, nor the size of the population that elected the body, provide any basis to establish a new constitutional standard separate from *Midkiff*.

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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No. 97-1958

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

SMALL LANDOWNERS OF OAHU, AND RICHARD S.H. WONG, OSWALD K. STENDER, MARION M.L. LINDSEY, GERARD A. JERVIS, AND HENRY H. PETERS, in their capacities as Trustees of the Kamehameha Schools Bernice Pauahi Bishop Estate,

Petitioners,

v.

CITY AND COUNTY OF HONOLULU

Respondents,

and

HAWAII EQUITY LEASEHOLDERS' COALITION, a Hawaii non-profit corporation

Intervenor.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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INTERVENOR'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether rational-basis review is the appropriate standard for determining the validity of a municipal ordinance providing for a compensated condemnation of private property to effect a transfer of land ownership.

2. Whether a court should use a higher and stricter standard in reviewing a municipal ordinance which provides for a compensated taking.

LIST OF PARTIES

The parties to the proceeding before the United States Court of Appeals for the Ninth Circuit whose judgment is sought to be reviewed herein are as follows:

City and County of Honolulu, Hawaii

Hawaii Leaseholders' Equity Coalition ("HALE Coalition")

Small Landowners of Oahu

Gerard A. Jervis, as Trustee of the Kamehameha Schools Bernice Pauahi Bishop Estate

Marion M.L. Lindsey, as Trustee of the Kamehameha Schools Bernice Pauahi Bishop Estate

Henry R. Peters, as Trustee of the Kamehameha Schools Bernice Pauahi Bishop Estate

William S. Richardson, as Trustee of the Kamehameha Schools Bernice Pauahi Bishop Estate

Oswald K. Stender, as Trustee of the Kamehameha Schools Bernice Pauahi Bishop Estate

Matsuo Takabuki, as Trustee of the Kamehameha Schools Bernice Pauahi Bishop Estate

Myron B. Thompson, as Trustee of the Kamehameha Schools Bernice Pauahi Bishop Estate

Richard S.H. Wong, as Trustee of the Kamehameha Schools Bernice Pauahi Bishop Estate

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Intervenor-Respondent states the following:

Intervenor-Respondent Hawaii Leaseholders' Equity Coalition ("HALE Coalition") is a Hawaii non-profit corporation that has no corporate parents or wholly-owned subsidiaries.

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OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at Richardson v. City and County of Honolulu, 124 F.3d 1150 (9th Cir.1997) (Respondent's Appendix A, 1a to 24a).[1] The opinions of the District Court deciding the constitutional challenge to the City and County of Honolulu's leasehold conversion and rent control ordinances and whose judgments were reviewed on a consolidated basis by the Court of Appeals, are Richardson v. City and County of Honolulu reported at 802 F.Supp.326 (D.Haw.1992) (Ezra, D.J.) ("Richardson") (Respondent's Appendix B, 25a to 50a), and Small Landowners of Oahu v. City and County of Honolulu reported at 832 F.Supp. 1404 (D.Haw.1993) (Fong, D. J) ("Small Landowners") (Respondent's Appendix C, 51a to 61a). The Court of Appeals affirmed the constitutionality of Ordinance 91-95. Ordinance 91-95 is reproduced at Respondent's Appendix D, 62a to 81a.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit rendered its judgment and opinion on September 8, 1997 upholding the constitutionality of Ordinance 91-95. The timely petition for rehearing and suggestion for rehearing en banc was filed on September 18, 1997 by the Trustees of Kamehameha Schools Bernice Pauahi Estate (hereinafter "Bishop Estate"). The Court of Appeals denied the petition for rehearing on March 6, 1998.

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[1] Citations to the Respondent's Appendix will hereinafter be cited as "Resp.App. ___".

The Small Landowners of Oahu ("Small Landowners") and the Bishop Estate filed a Petition for a Writ of Certiorari on June 3, 1998.

The HALE Coalition files this Opposition to the Petition for a Writ of Certiorari pursuant to Supreme Court Rule 15.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Takings Clause of the Fifth Amendment provides:

> [N]or shall privately property be taken for public use without compensation.

United States Constitution, Amendment V.

The statutory provision involved is Honolulu City and County Ordinance No. 91-95 (December 18, 1991).

I. STATEMENT OF THE CASE

This case is one-step in Hawaii's continuing efforts to modernize the state's centuries old land tenure system. *See* J. Chinen, The Great Mahale; Hawaii's Land Division of 1848, (1958).

Since the enactment of Hawaii's Land Reform Act, Chapter 516, Haw. Rev. Stat., in 1967, the state and local governments have implemented legislation to modernize the Hawaiian land ownership system. District Court Judge Samuel P. King in Midkiff v. Tom, 483 F.Supp. 62 (D.Haw.1979)[2] recognized that:

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[2] Midkiff v. Tom, 483 F.Supp. 62 (D.Haw.1979), rev'd. 702 F.2d 888 (9th Cir.1983) district court ruling reinstated in Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984).

> "Hawai'i has an uncommon system of landholding. A substantial part of all residential land is held by a few interests and leased to a large number of residential lessees.

483 F.Supp. at 67 (hereinafter "Midkiff").

In Midkiff, the Kamehameha Schools Bernice Pauahi Bishop Estate ("Bishop Estate"), argued that they could demonstrate that all of the economic justifications for Chapter 516, Haw. Rev. Stat., the Land Reform Act, were incorrect and the state legislature was wrong in enacting the legislation allowing the condemnation of a ground lessor's interest and the transfer of the condemned interest to the owners of single family residences.

In upholding the Land Reform Act, District Judge King said that "all the Court had to do was look at the broadest possible rationale—

> "that of redistributing residential land and changing the pattern of residential ownership in Hawaii."[3]

483 F.Supp. at 67.

This Court, in the Midkiff case, recognized that the Hawaii's land holding system was a unique unwelcome legacy of the Nineteenth Century.

> "On this basis, we have no trouble concluding that the Hawaii Act is constitutional. The people of Hawaii have

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[3] Judge King further observed

> "All that the Court need rely on in the way of evidence to support this conclusion is the system of landholding in Hawaii—the concentration of land in a few large landholders. At the preliminary injunction hearing, [see Midkiff v. Tom, 471 F.Supp. 871 (D.Haw.1979)], there was testimony and documentary evidence concerning the way land is held in Hawaii. The Court believes that given this system of landholding, the Legislature had the right, pursuant to its police power, to conclude that the general welfare of the people of Hawaii was served by condemning the land of large landholder-lessors and allowing the lessees to purchase that land from the State. The Legislature had the right to conclude that Hawaii's system of landholding was injurious to the social and economic health of the community.

483 F.Supp. at 68.

> attempted, much as the settlers of the original 13 Colonies did, to reduce the perceived social and economic evils of a land oligopoly traceable to their monarchs. The land oligopoly has, according to the Hawaii Legislature, created artificial deterrents to the normal functioning of the State's residential land market and forced thousands of individual homeowners to lease, rather than buy the land underneath their homes."

Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 241-42 (1984). [4]

When this Court upheld the right of the State of Hawaii to enforce "lease to fee" conversion for single family residences in Hawaii, the City and County of Honolulu, was left with the problem of leased fee ownership beneath the City's condominiums and other cooperative housing arrangements.

The condominium apartment owners attempted to enact legislation which would extend the Land Reform Act to fee interests in condominium-type projects and establish a limit on renegotiated rents for owner-occupants who could not purchase the fee interest.

The efforts resulted in the concurrent enactment of Ordinance 91-95 and Ordinance 91-96 by the City and County of Honolulu in December, 1991.

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[4] This Court noted that Hawaii, like the colonists after the American Revolution, took steps to eradicate the feudal incidents where large land owners encumbered tracts of land by long term leases with their tenants. This Court concluded the footnote, by observing

> "Courts have never doubted that such statutes served a public purpose. See, e.g. Wilson v. Iseminger, 185 U.S. 55-60-1, 22 S.Ct. 573, 574-75, 46 L.Ed. 804 (1902); Stewart v. Gorter, 70 Md. 242, 244-45, 16 A.644, 645 (1889)."

467 U.S. at 241, n.5.

In the Nineteenth Century, New York made a similar attempt to eliminate the colonial legacy of large landholdings being rented to lessee-occupants. See D.M. Ellis, Landlord and Farmers in the Hudson-Mohawk Region, 1790-1850, especially Chapter VII. "The Anti-Rent Movement 1839-1845" and Chapter VIII, "Antirentism in Politics" (1946) and DePeyster v. Michael, 6 N.Y. 467 (1852).

But See Palairet's Appeal, 67 Pa. 479, 5 Am.Rep. 450 (1871) (invalidating Pennsylvania statute for redemption of leased land).

Ordinance 91-95 became effective was enacted on December 18, 1991. That same day, the Bishop Estate filed the present action to enjoin the enforcement of both Ordinances.[5]

In Richardson v. City and County of Honolulu, 802 F.Supp. 326 (D.Hawaii 1992), Bishop Estate argued that (1) Ordinance 91-95 should be invalidated on the ground that it was nothing more than legislation which transferred land from one private party to another private party, and (2) the ordinance could not be supported as an attempt to breakup the concentration of land ownership because the concentration of land ownership, with respect to leasehold condominiums, "was not as drastic as the land oligopoly which resulted in the Land Reform Act."

Judge David Ezra rejected the Bishop Estate's argument that the concentration of land ownership in the leasehold condominium market was less concentrated than in the single family residence market at the time the Land Reform Act was enacted by noting that,

> "Bishop Estate's own filings reveal that in 1987, the land underlying 45% of the condominium projects was owned by only 51 lessors.... Furthermore, at the time Ordinance 91-95 was enacted, Bishop Estate alone owned the fee simple interest under approximately 12,500 of the leasehold condominium units."

802 F.Supp. at 341, n.24 (Resp. App. 43a).[6]

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[5] Ordinance 91-96 was invalidated in the same action and is the subject of HALE Coalition's conditional cross-petition for a writ of certiorari.

[6] The Petitioners at Appendix H, append the research report prepared in part by the law firm of Ezra, O'Connor Moon & Tam, entitled "Leasehold Conversion of Condominiums and Cooperative Housing Projects," Phase I, November, 1987 (hereinafter "Ezra Report"). Judge Ezra, the author of the Richardson case was the senior partner in the law firm which prepared the report for the State of Hawaii. The Ezra Report is attached as Appendix E at Resp. App. 82a to 89a.

Judge Ezra concluded that

> "[w]hile the current concentration of land ownership with respect to leasehold condominiums may not be as drastic as the land oligopoly which prompted the Land Reform Act, this contention does not undermine the City's determination that permitting leasehold condominium owners to purchase the underlying property serves a legitimate public purpose."

802 F.Supp. at 341 (Resp. App. 43a).

In Small Landowners of Oahu v. City and County of Honolulu, 832 F.Supp. 1404 (D.Haw.1983), the Small Landowners attacked the City Council's finding that land ownership was concentrated in the hands of owners who had refused to sell their fee simple interests to the owner-occupants. The Small Landowners, argued that the fee simple ownership of condominiums was spread among many owners and there was no concentration of ownership. Thus, the Small Landowners contended that there was no oligopoly in condominium ownership that would support the enactment of Ordinance 91-95, distinguishing the Midkiff case. 832 F.Supp. 1404 (Resp. App. 58a).

Judge Fong rejected the Small Landowners' characterization of the basis of Ordinance 91-95 as an unwarranted taking of private property since there was no land oligopoly, which had to be broken up. Rather, Judge Fong correctly saw the purpose of Ordinance 91-95 as a means of transferring ownership of the lease fee interests from lessors to owner-occupants because

> "ownership was concentrated among landowners who have refused to sell. That almost proves itself because landowners who have agreed to sell are no longer owners."

The Ezra Report concludes that "on Oahu (City and County of Honolulu), where the majority of residential condominiums and cooperative projects are located, 60% or 518 of the projects and over 70% or 53,898 of the units are leasehold."

832 F.Supp. at 1410 (Resp. App. 58a).

In Small Landowners, the district court also noted that the City Council had ample testimonial evidence supporting the finding that Ordinance 91-95 was enacted to remedy the problem of fee owners who refused to sell to owner-occupants.

On appeal by both the Bishop Estate and the Small Landowners, the Ninth Circuit, in sustaining the constitutionality of Ordinance 91-95, recognized the unique Hawaiian feudal-like land ownership system that was "remarkably resistant to change."

The Court of Appeals noted that this long-standing pattern of land ownership resulted in a market where, in the late 1980s, the largest 18 landowners in the state owned 40% of the available land, the 72 largest owners owned 47% of the land, while the federal and state government owned 49% of the remaining land. Bishop Estate itself owned 20% of the condominium ground leases on Oahu. Richardson v. City and County of Honolulu, 124 F.3d 1154 (Resp. App. 3a).

These land concentration statistics lead the Court of Appeals to conclude that "little is left for the rest of the population." Id.

The Ninth Circuit panel also addressed the Petitioners' argument that there was no "public use" supporting the enactment of Ordinance 91-95.

Unlike Midkiff, Ordinance 91-95, according to the Ninth Circuit, was

> "...not grounded on the desire of breaking up a land oligopoly. Rather, the City enacted the Ordinance to strengthen Oahu's economy and remedy perceived failures in its real property market."

124 F.3d at 1158 (Resp. App. 9a).

The Appeals Court found that correcting the failure in the real estate market caused by condominium ground lessors who would not sell their leased fee

interests to the condominium owner-occupants, was a legitimate public use of the power of eminent domain.[7]

The lack of a legitimate "public use" and the absence of evidence supporting Ordinance 91-95 were raised as grounds for invalidating Ordinance 91-95 by the Bishop Estate and the Small Landowners in three courts, twice in the District Court in Hawaii and once at the appellate level in the Ninth Circuit. Each time, the several courts rejected the Petitioners' arguments.

For good reason the trial courts and the Ninth Circuit have rejected the Petitioners' arguments that a review of the "public use" justification for Ordinance 91-95 requires a higher and stricter scrutiny because of the post-Midkiff decisions of this Court,[8] which call for a more rigorous and stricter review of the stated legislative purpose than the rational basis test provided for in Midkiff in the context of *uncompensated, regulatory takings*.

In addition to the argument that the courts should have reviewed the legislative purpose and findings Ordinance 91-95 under a strict scrutiny test, the Petitioners also raise the issue that a stricter standard of review should be used when the

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[7] In response to the allegations that the City Council failed to establish concentration of ownership, the Court of Appeals compared concentration rates at the time of Midkiff and at the enactment of Ordinance 91-95. The City Council hearings established that the 20 largest landowners owned 34.9% of the land under condominiums in Honolulu and the largest 60 landowners owned 50.4% of the ground area. The Court concluded that while the largest 20 landowners owned a smaller percentage of land underneath condominiums than the largest 22 owned of the fee simple titles under single-family residences in Midkiff, nonetheless,

> "the concentration of ownership of land underneath condominiums is greater than the concentration of land ownership throughout the state at the time Midkiff was decided."

Sixty (60) persons owned 50.4% of the ground leases under Honolulu condominiums while at the time of Midkiff, 72 private landowners owned 47% of the land statewide. 124 F.3d at 1159 (Resp. App. 10a).

[8] These cases are Nollan v. California Coastal Commission, 483 U.S. 825 (1987) ("Nollan"); Lucas v. South Carolina Coastal Commission, 505 U.S. 1003 (1992) ("Lucas") and Dolan v. City of Tigard, 512 U.S. 374 (1994) ("Dolan").

power of eminent domain is exercise by a local governmental body rather than a state legislature.

II. REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

The Petitioners argue that their Petition for a Writ of Certiorari should be granted in order to revisit the Midkiff case and the standard for reviewing and deference to be accorded to the "public use" determination of a governmental body, especially a local governmental entity, in the case of compensated takings.

HALE Coalition opposes the granting of the Petition for Writ of Certiorari on the grounds (1) the reviewing courts properly applied the Midkiff rational-basis standard to review the City Council's exercise of its eminent domain authority in the context of a compensated taking, and (2) a local governmental body is the appropriate entity to exercise the power of condemnation when the problem is uniquely local and not of statewide interest and a court should use the rational basis standard in reviewing legislation enacted by a local governmental body effecting strictly local concerns.

A. THE LOWER COURTS PROPERLY APPLIED MIDKIFF IN REVIEWING ORDINANCE 91-95

This case, like Midkiff, presents this Court with a second opportunity to review Hawaii's attempt to modernize its feudal-like land tenure system.[9]

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[9] In the Twentieth Century only Hawaii and Puerto Rico have enacted legislation to modernize their land tenure systems through government condemnation. In the People of Puerto Rico v. Eastern Sugar Associates, 156 F.2d 316 (1st Cir.1946) *cert. denied*, 329 U.S. 722, 67 S.Ct. 190, 91 L.Ed. 664 (1946), the First Circuit Court of Appeals sustained a commonwealth-wide agricultural land tenure modernization program to transfer private lands controlled by large corporations into the control of local residents. In the Midkiff case, this Court recognized the parallels between Hawaii's efforts to restructure the land tenure system for single-family residences and, in the Puerto Rico case, with the *agricultural land ownership patterns*. See Midkiff, 467 U.S. at 242.

In Midkiff, this Court upheld Hawaii's efforts to break up an oligopolistic land tenure system relating to ground leases for single-family residences under a rational-basis standard of review.

With respect to condominiums, where the problem was more localized to the City and County of Honolulu, the Honolulu City Council, sought to alter the land owning system under the City's condominiums and cooperatives by allowing the owner-occupants to purchase the leased fee interests from the ground lessors.

In December 1991, the Honolulu City Council enacted Ordinance 91-95, after extensive public hearings, including statements from condominium owners and lessees. The City Council, after the public hearings, found that "under the burden of increased lease rents, many owner-occupants of residential condominium apartments... especially those on fixed incomes, have found, and will continue to find themselves unable to afford to continue living in their homes." Ordinance 91-95, §1(a) (Resp. App. 62a-63a).

Many of these owner-occupants faced renegotiated ground lease rents of over 1000 percent higher than the rent for the previous period, and the City Council found that

> "[I]f they are displaced from there, these owner-occupant lessees could be displaced entirely from the ranks of homeowners because of Oahu's continuing housing crisis."

To alleviate this potential housing crisis, many of the lessees wanted to convert their leases to fee ownership, but the refusal of the condominium landowners to sell their leased fee interest to the lessees "has resulted in a serious shortage of fee simple residential condominium land... and in an artificial inflation of the value of such land on Oahu." See Ordinance 91-95, §1(a).

This is the real purpose of Ordinance 91-95, facilitating the transfer of the fee simple interest from the ground lessors who refuse to sell to the owner-occupants. The Ordinance was an effort to facilitate a uniting of the ownership of land and apartment units in the hands of owner-occupants.

Due to the shortage of fee simple residential condominium land, the refusal of the ground lessors to sell to the apartment owners and the artificially high land prices, the Honolulu City Council found that many people on Oahu had been deprived of an opportunity to purchase a fee simple interest in the land beneath their own condominium units. Given the inability to purchase their proportionate share of the land underlying their condominiums, owner-occupants,

> "have been forced to accept long-term leases or renewed leases of such land which contain terms and conditions that are financially disadvantageous to them... [and] ... are weighted heavily in favor of the landowners; or [if they cannot afford the renegotiated lease rent] surrender title to and possession of their residential condominium... at the expiration of their current leases."

If, the owner-occupants of the condominium units were allowed to purchase the lease fee

> "at fair and reasonable prices and the ability of such lessees and owners to fully enjoy such land through proportionate ownership of such land in fee simple [would] alleviate these conditions and will promote the economy of Oahu and public interest, health, welfare, security and happiness of such lessees and owners."

To accomplish this objective, the City Council decided to enact Ordinance 91-95 to change the "present patterns of such [condominium] land ownership on Oahu by allowing residential condominium lessees... under leases of such land to purchase in

fee simple... [which] will help to satisfy the pressing public necessity for a secure, strong and stable Oahu economy." See Ordinance 91-95, §1(a) (Resp. App. 64a).

In order to advance the public interest and maintain a "secure, strong and stable Oahu economy," the Honolulu City Council decided to exercise its eminent domain authority to condemn the fee simple interests in residential condominiums where the ground lessors refused to sell to the owner-occupants; and thereby make these proportionate shares of the fee simple available for tenants

> "who are condominium lessees... under leases of such land on which their homes are situated, or who face eminent expiration of such leases and the potential surrender, altogether, of title to and possession of their residential condominium apartments... is for a public use and purpose."

Ordinance 91-95 was an attempt by the Honolulu City Council to restructure a century's old land ownership system, through the use of the City's eminent domain authority, by transferring the leased condominium land to the owner-occupants.

Although the Ordinance ultimately uses the power of condemnation, in §2.6(a) after an initial filing, the ground lessor and the lessees were requested

> "to negotiate the just compensation which the lessees will pay to the lessor to acquire the lessor's interest in the development."

As pointed out in §2.6(b) of the Ordinance, "preliminary negotiation shall be in advance of and shall not constitute any part of any action in condemnation or eminent domain." In short, the Ordinance encourages voluntary, cooperative and non-coercive transfers of the lessor's leased fee interest and only *after* these negotiations fail, would the City exercise its powers of eminent domain to transfer the leased fee interest to the owner-occupants, for full, fair and just compensation.

All of the prior court opinions recognized that the Honolulu City Council's "public use" or "public purpose" was to transfer to the owner-occupants their proportionate share of the ground lease underneath their condominiums so that (a) when the initial ground lease term expired, the owner-occupants would not have to renegotiate their rent at rates of up to 1000 percent of their initial rent, or (b) if the owner-occupant could not afford the renegotiated rent for the next rental period, abandon and surrender the apartment unit, for no compensation, to the ground lessor and effectively be dispossessed and homeless, after years of living in the condominium unit.[10]

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[10] Judge Ezra wrote

> The City... found that the owners of such leased land had generally refused to sell proportionate shares in the land underlying such unit. *Id.* As a result of this practice, the City determined that there exists "a serious shortage of fee simple residential condominium land, cooperative housing unit land and planned development land and [ ] an artificial inflation of the value of such land on Oahu." *Id.*
>
> Accordingly, the City concluded that owners of condominiums on leased land should be able to acquire the proportionate share of leased land underlying their units at a fair and reasonable price. In order to accomplish this objective, the City decided to use its eminent domain power to condemn the fee simple title to the land underlying condominiums, pay just compensation to the lessors/owners of such land, and sell the land to the condominium owners. Ordinance 91-95 §1(a) (Resp. App. 40a-41a).

In the present case, the City Council determined that ownership of land beneath residential condominium projects is concentrated in the hands of owners who have refused to sell proportionate shares in their fee simple interest titles to lessees residing in the condominium units. Ord. 91-95 §1. Thus, the City Council's primary concern was apparently the inability of the owners of leasehold condominiums to purchase proportionate shares of the underlying fee simple title. While the current concentration of land ownership with respect to leasehold condominiums may not be as drastic as the land oligopoly which prompted the Land Reform Act, the Court of Appeals found that the concentration of land ownership of land underneath condominiums was greater than the concentration of land ownership throughout the state at the time of the Midkiff decision. 124 F.3d at 1159 (Resp. App. 10a).

The evidence reviewed by the City adequately demonstrated that the land underneath the condominiums was not being sold and that the lack of such sales was driving up the price of housing in Honolulu.

As the Richardson and Small Landowners courts observed, the real problem was not the breaking up of a land oligopoly,[11] but the refusal of the ground lessors to sell the leased land to the owner-occupants.

The owner-occupants who are unable to afford the renegotiated rent, would be forced to surrender their owner-occupied apartments to the ground lessor without compensation, and the owner-occupants would be dispossessed of their unit and forced to look for new housing in an inflated Honolulu housing market.

The "public use" of Ordinance 91-95 is to create a market in leased fee land so that the present owner-occupants can be given the option of purchasing the land underneath their apartment unit at a fair price rather than pay the renegotiated rent, in some projects, at several hundred percent over and above their present rent.

The owner-occupants, confronting the renegotiated rent, have two options. First, the owner occupants can acquiesce and pay the renegotiated rent and continue to live in the apartment. Second, if the owner-occupant, many living on fixed incomes, cannot afford the renegotiated rent, then the owner-occupant must surrender the apartment unit at the end of the initial lease period, without compensation, to the ground lessor, be dispossessed and forced to relocate to other lodgings. This option, of paying a highly inflated ground lease rent or surrendering and abandoning the owner-occupant's unit, was found by the City Council to create a potential housing crisis and a destabilization of the Oahu economy.

The Honolulu City Council believed that the dispossession of large numbers of owner-occupants, because of Hawaii's unique feudal-like land tenure system

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[11] The City Council found 16,000 - 17,000 residential condominiums, cooperatives and planned developments on Oahu. Of these, Bishop Estate alone "owned the fee simple interest under approximately

and the high housing costs, would create a housing crisis and only the transfer of the fee interest to the owner-occupants, thereby uniting the ownership of the apartment unit and the land underneath the condominium project, would alleviate the problem.

Because of the dramatic increase in housing prices, in part caused by the failure of the real estate market to create fee simple ownership of condominium land, there was a possibility of a housing crisis for the dispossessed owner-occupants who could not afford to pay the renegotiated rent.

HALE Coalition submits that the City's use of its power of eminent domain to prevent a housing crisis resulting from a dispossession of the apartment-owners who could not afford the renegotiated rent was a valid "public purpose" and "public use" of its power of condemnation and under any test, the rational-basis or strict scrutiny, Ordinance 91-95 is a valid exercise of the City's police power. This is not an appropriate case for the Court to revisit or reconsider Midkiff because the rational-basis standard of review was properly used by the courts in reviewing Ordinance 91-95 as a *compensated taking*.

B. THE RATIONAL BASIS STANDARD OF REVIEW IS APPROPRIATE IN REVIEWING THE ENACTMENT OF LOCAL MEASURES BY A LOCAL GOVERNMENT BODY

The Petitioners contend that this Court should not give the same deference to the Honolulu City Council's findings and conclusions of public use because the City Council is a local body subject to parochial interests. Petitioner's Brief at pp. 17-18.

This argument by the Petitioners, that less deference should be shown and closer judicial scrutiny should be given to locally-enacted condemnation procedures

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12,500 of the leasehold condominium units." Small Landowners, 802 F.Supp. 341, n.24 (Resp. App. at 43a).

because local bodies, like the Honolulu City Council, may be subject to "the dangers of illegitimate decision making, especially with respect to takings of private property..." is not applicable to the case at bar.

This is a variation of the Bishop Estate's preemption argument in Richardson to the effect that given the state-wide importance of the lease to fee conversion for condominium projects, the state legislature not the Honolulu City Council, should have enacted legislation condemning leased fee interests for condominium projects.

Judge Ezra certified the question of preemption to the State Supreme Court. In Richardson v. City and County of Honolulu, 76 Haw. 46, 868 P.2d 1193 (1994), the Hawaii Supreme Court held that the City and County of Honolulu was not preempted by the state legislature in enacting lease to fee conversions for condominium units.

In fact, the State of Hawaii's study of Leaseholder Conversion of Condominium and Cooperative Housing Project Phase I, November 1987, the Ezra Report, established that condominium lease to fee conversion for owner-occupants was a uniquely Honolulu problem. See Leasehold Conversion of Condominiums and Cooperative Housing Projects, Phase I, attached as Appendix E (Resp. App. 82a to 89a).

In the Ezra Report, the study found approximately 16,400 units in Hawaii were owner-occupied leased condominiums. Sixteen thousand (16,000) of the 16,400 state-wide owner-occupied condominium units were located on Oahu. The neighbor islands,[12] had approximately 424 owner-occupied units. That means that approximately

[12] Including the Counties of Maui, Hawaii and Kauai.

98% of all owner-occupied condominium units statewide, were located in Honolulu. (Resp. App. 85a.)

Since less than 3% of the owner-occupied condominium units were located on the several neighbor islands, it can only be expected that the Honolulu City Council, which effectively is Oahu, would be concerned about the housing crisis caused by the rent renegotiations for the owner-occupied condominium units, where, if the owners could not afford the renegotiated rent, they would be forced to surrender their units, without compensation, and look for new housing in an inflated housing market.

The State of Hawaii Supreme Court in Richardson v. City and County of Honolulu, supra, recognized that the lease to fee conversion of condominium units was not preempted by the State and such lease to fee conversion legislation for condominiums could be enacted by the local governmental body.

The Honolulu City Council recognized that the problem of renegotiated rents, the possible dispossession of long-term owner-occupants; the surrender of the apartments by owner-occupants who could not afford the renegotiated rent and the resultant dislocation was a potential local crisis, not a statewide problem. With approximately 98% of the owner-occupied condominiums located in Honolulu, and just over 2% throughout the rest of the state, the Honolulu City Council was the appropriate legislative body to enact Ordinance 91-95.

The purpose of Ordinance 91-95 is to prevent present condominium owner-occupants from being dispossessed when the renegotiated rent becomes excessive and the owner-occupant is faced with the option of surrendering the unit to the ground lessor or accepting the renegotiated rent. This was a concern only in Honolulu, where virtually all owner-occupant condominiums are located.

Unlike Nollan, Lucas and Dolan, there is no question but the owner-occupants must pay just compensation and the reasonable value of the leased fee to the lessors. The purpose of Ordinance 91-95 is to avoid the problem of excessive rent imposed on the owner-occupant, with the owner-occupant given the choice of paying the new rent which could be as much as a 1000% increase over the present rent, or surrendering the unit to the ground lessor and looking for new housing in an inflationary housing market.

This was a uniquely local problem and given the thousands of owner-occupants to be effected, there is no grounds to impose a higher, stricter standard of review on the City Council's actions. If the Honolulu City Council was enacting an ordinance which exceeded the remedies necessary to alleviate a local problem, possibly the courts could have used a stricter standard of review. In this case, the problem was Honolulu-wide, not statewide, the remedy was limited and the consequences of failing to act disastrous.

While Ordinance 91-95 does not provide for direct public money to purchase the lease fee, it establishes a procedure whereby owner-occupants may purchase the lease fee from the ground lessors who refuse to sell, at a fair and reasonable price. See Ordinance 91-95, §1(b) (Resp. App. 64a).[13]

In this regard, Nollan, Lucas, and Dolan, and the use of the heightened strict scrutiny standard applicable in cases of uncompensated regulatory takings is not

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[13] The City proposes to use its eminent domain power.

> "and by providing for the public financing of such purchase and such condemnation and payment through the issuance of bonds, the expenditure of general revenue funds and the use of private funds which are at the disposal of the City."

Ordinance 91-95 §1(b).

justified because the ground lessor is fully and fairly compensated for the interest purchased by the owner-occupants and the Honolulu City Council dealt with the uniquely local problem with a local remedy.

III. CONCLUSION

Hawaii Equity Leaseholders' Coalition respectfully requests this Court deny the Petition for Writ of Certiorari filed by the Petitioners, the Bishop Estate and the Small Landowners of Oahu.

Respectfully submitted

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Admitted to the Bar of the United States Supreme Court on December 31, 1979

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 94-16041, 94-16142,
94-16143 and 94-16327

WILLIAM S. RICHARDSON; HENRY H. PETERS, JR.; OSWALD K. STENDER, MYRON B. THOMPSON, and MATSUO TAKABUKI, in their capacities as Trustees of the KAMEHAMEHA SCHOOLS/BERNICE PAUAHI BISHOP ESTATE,
Plaintiffs-Appellants,

V.

CITY AND COUNTY OF HONOLULU,
a Hawaii Municipal Corporation,
Defendant-Appellee,

and

HALE COALITION,
Intervenor.

WILLIAM S. RICHARDSON; HENRY H. PETERS, JR.; OSWALD K. STENDER, MYRON B. THOMPSON, and MATSUO TAKABUKI, in their capacities as Trustees of the KAMEHAMEHA SCHOOLS/BERNICE PAUAHI BISHOP ESTATE,
Plaintiffs-Appellees,

and

HALE COALITION,
Intervenor,

CITY AND COUNTY OF HONOLULU,
a Hawaii Municipal Corporation,
Defendant-Appellant.

WILLIAM S. RICHARDSON; HENRY H. PETERS, JR.; OSWALD K. STENDER, MYRON B. THOMPSON, and MATSUO TAKABUKI, in their capacities as Trustees of the KAMEHAMEHA SCHOOLS/BERNICE PAUAHI BISHOP ESTATE,
Plaintiffs-Appellees,

V.

HAWAII LEASEHOLDERS EQUITY COALITION,
Intervenor-Appellant,

and

CITY AND COUNTY OF HONOLULU
a Hawaii Municipal Corporation,
Defendant.

SMALL LANDOWNERS OF OAHU,
Plaintiff-Appellant,

V.

CITY AND COUNTY OF HONOLULU '
Defendant-Appellee.

Argued and Submitted Nov. 2, 1995
Decided Sept. 8, 1997

Appeals from the United States District Court for the District of Hawaii; David A. Ezra, District Judge, Presiding. D.C. No. CV-91-00725-DAE.

Appeal from the United States District Court for the District of Hawaii; Harold M. Fong, District Judge, Presiding. D.C. No. CV-92-00372-HMF.

Before: HUG, Chief Judge, THOMPSON and O'SCANNLAIN, Circuit Judges.

HUG, Chief Judge:

OPINION

In these consolidated cases we are asked to determine the constitutionality of two land reform ordinances passed by the City Council for the City and County of Honolulu (the "City"). Ordinance 91-95 provides a mechanism for converting leasehold interests in condominium units to fee interests, through the use of the City's condemnation power. Ordinance 91-96 is a rent control measure that limits increases in ground rent due the owner of the land under the condominium units. The trustees of the Bishop Estate ("Bishop Estate") brought an action before District Judge Ezra contesting the constitutionality of both ordinances. The Small Landowners of Oahu ("Small Landowners") brought a separate action before District Judge Fong. Judges Ezra and Fong each entered summary judgments upholding Ordinance 91-95. Judge Ezra also entered a summary judgment holding Ordinance 91-96 (the rent control ordinance) unconstitutional. We have jurisdiction under 28 U.S.C. § 1291 and we affirm.

I. BACKGROUND

Prior to American acquisition, Hawaii developed an extensive feudal land ownership system that has proved remarkably resistant to change. Although Hawaiian leaders and American settlers have repeatedly attempted to divide the large Hawaiian land estates, the results have generally been unsuccessful. As of the late 1980's, the largest eighteen landowners in the state owned 40% of the available land. L.A. Powe, Jr., *Economic Make-Believe in the Supreme Court,* 3 Const. Comm. 385, 389 (1986). The seventy-two largest landowners owned 47%. *Id.* With the federal and state government owning 49% of the land in the state, *id.*, little is left for the rest of the population. As might be expected in an area of desirable real estate with little land for sale, the price of owning land in Hawaii has grown exponentially over the past several decades.

The large private landowners have adopted a pattern of leasing their land for long terms rather than selling it. Often the land is leased to a developer who builds condominiums[1] on the property. The condominiums are then sold subject to the ground lease. Sometimes the landowners themselves build and sell the condominiums, subject to a

[1] For purposes of this opinion, unless otherwise noted, references to "condominiums" or "condominium properties" include condominium property regime developments, cooperative housing corporation developments, and planned unit developments, which are the three types of developments addressed by Ordinances 91-95 and 91-96.

ground lease. The leases, commonly for 55 years or longer, require a substantial initial payment and lease payments for 25 to 30 years at a fixed rate. At the end of the initial term, the rent is renegotiated pursuant to the terms of the lease. The new rent usually is based on the market value of the unimproved land as described in the lease. Stated another way, the renegotiated rent is fixed at a percentage of the market value of the parcel underneath the condominium exclusive of improvements *(i.e.,* the condominium).[2] In almost all cases, the renegotiated rent substantially exceeds the initial fixed rate.

To break up this pattern of land ownership and control the escalating prices of housing, the City passed Ordinances 91-95 and 91-96 on December 18, 1991.

That day the appellants in *Richardson* filed suit in federal court before Judge Ezra seeking declaratory and injunctive relief. The *Richardson* appellants are trustees of the Bishop Estate, a charitable trust established in 1884 under the will of Ke Ali'i Bernice Pauahi Bishop, the great-granddaughter of King Kamehameha I, to erect and maintain schools for indigents and orphans who are native Hawaiians. The Bishop Estate owns the fee simple title to the land underneath condominiums in Honolulu that are affected by the Ordinances.[3] A group of condominium owners calling themselves the Hawaii Leaseholders Equity Coalition (the "HALE coalition") was granted permission to intervene in the action as an interested party.

On February 14, 1992, the Bishop Estate filed a partial motion for summary judgment. On June 8, 1992, the HALE Coalition also moved for partial summary judgment. On June 9, 1992, the City filed a cross-motion for summary judgment on all counts.

Meanwhile, on June 12, 1992, the Small Landowners, a nonprofit membership corporation representing landowners who own smaller plots of land underneath condominium projects, filed a separate complaint in federal court before Judge Fong seeking a declaration that Ordinances 91-95 and 91-96 were constitutionally invalid. The Small Landowners moved to consolidate their action with (or alternatively, to intervene in) the action instituted by the Bishop Estate. The motion was denied and the Small Landowners' suit proceeded separately.

On September 16, 1992, Judge Ezra (1) declared Ordinance 91-96 unconstitutional on its face under the Takings Clause; (2) held that Ordinance 91-95 was facially constitutional under the Public Use, Just Compensation, Due Process, and Equal Protection Clauses of the federal and Hawaii constitutions; and (3) certified to the Hawaii

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[2] An example provided by the landowners in their brief is illustrative. The lessees of one apartment purchased their unit in January of 1988 for $986,500, and assumed the existing ground lease. They currently pay $45 per month in ground lease rent and will continue to do so until the 30-year fixed rent period expires in 1997. At that time, the lease fixes the new rent at six percent of the fair market value of the land exclusive of improvements. If the period had ended in 1991, the parties to the lease might have used the real property tax assessed value used by the City as the fair market value of the land exclusive of improvements. In 1991 the real property tax assessed value used by the City for the land appurtenant to the unit was $213,300. The new ground lease rent would be 6% of that figure, which is $12,798 per year, or $1,066 per month.

[3] The City contends that the Bishop Estate owns approximately 20% of the condominiums on Oahu. The Bishop Estate does not refute this number.

Supreme Court the question whether Ordinance 91-95 was preempted by state law. *See Richardson v. City & County of Honolulu,* 802 F.Supp. 326 (D.Haw.1992).

The Small Landowners and the City subsequently stipulated to dismiss the Small Landowners' claim regarding Ordinance 91-96. The parties also agreed to dismiss the Small Landowners' claims regarding state law preemption, because those questions would be decided by the Hawaii Supreme court in the *Richardson* case. On September 16, 1993, Judge Fong issued his order holding that Ordinance 91-95 was facially constitutional under the Takings, Due Process, and Equal Protection Clauses of the federal and Hawaii constitutions, and that the Small Landowners' claims that Ordinance 91-95 failed to provide just compensation or comply with the City's Charter were unripe. *See Small Landowners of Oahu v. City & County of Honolulu,* 832 F.Supp. 1404 (D.Haw.1933).

On February 22, 1994, the Hawaii Supreme Court answered the certified question from *Richardson* in the negative, *Richardson v. City & County of Honolulu, 76* Hawai'i 46, 868 P.2d 1193 (1994), and on April 12, 1994, Judge Ezra adopted the Hawaii Supreme Court's answer. On April 18, 1994, Judge Ezra entered final judgment. Judge Fong entered final judgment in *Small Landowners* on June 20, 1994. All parties filed timely notices of appeal. Because of the similar issues presented, the two actions were consolidated before this court after oral argument.

II. ORDINANCE 91-95

A. THE STATUTE

Ordinance 91-95, which closely parallels Hawaii's Land Reform Act of 1967, creates a mechanism through which condominium owners can convert their leasehold interests into fee simple interests. When at least 25 owners in a condominium complex or the owners of 50% of the units, whichever is less, apply to purchase their leased fee interest, the Ordinance's condemnation procedure is triggered. The Department of Housing and Community Development (the "Department") then determines if the property is proper for condemnation. The Department will begin condemnation proceedings within twelve months unless the owner agrees to voluntarily sell the leased fee interest to the lessees. If the Department condemns the land, the lessee must purchase the land from the City within 60 days.

In conjunction with enacting the Ordinance, the City made several findings regarding the concentration of land in Honolulu and the effects of such concentration on the local economy. First, the City found that landowners have refused to sell proportionate shares in their fee simple titles and that the few sales that occurred involved exorbitant prices. Honolulu City & County, Haw. Ordinance 91-95, § 1 (a). This refusal to sell fee simple titles along with other factors, has caused a dramatic increase in the price of housing in Honolulu. *Id.* The City further found that persons wishing to reside on Oahu were forced to sign long-term leases that provide for periodic rent renegotiation. *Id.* These conditions have led to

> the acute recent inflation of land costs [that] has adversely affected lease rent negotiations of persons who have purchased leasehold multi-family units as their homes: in some

> instances renegotiations have resulted in lease rents that have increased over 1,000 percent. Under the burden of increased lease rents, many owner-occupants of residential condominium apartments . . ., especially those on fixed incomes, have found, and will continue to find themselves unable to afford to continue living in their homes.

Id. Moreover, the City determined that these defects in the housing market would adversely affect the City's economy:

> There is a close relationship between the monetary values accorded land on Oahu and the stability and strength of Oahu's economy as a whole. Residential condominium . . . land values, artificially inflated by concentrated or single ownership, market conditions or other factors, skew Oahu's economy toward unnecessarily high levels. The pervasive and substantial contribution made to inflation by high residential condominium . . . land values creates a potential for economic instability and disruption on Oahu. Economic inflation, instability and disruptions on Oahu have real and potential damaging consequences for all members of an affected society.

Id. The City thus decided to exercise its power of eminent domain to establish a proper real estate market in Honolulu and to reduce the potential for economic instability on Oahu.

B. THE PUBLIC USE CLAUSE

The Bishop Estate and the Small Landowners (collectively the "landowners") argue that Ordinance 91-95 violates the Public Use Clause of the United States and Hawaii constitutions. The Fifth Amendment of the United States Constitution provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. This provision applies to the states through the Fourteenth Amendment. *See Missouri Pac. Ry. v. Nebraska,* 164 U.S. 403, 417, 17 S.Ct. 130, 135, 41 L.Ed. 489 (1896). Municipalities possessing delegated eminent domain power also are subject to the restrictions of the Fifth and Fourteenth Amendments. *See Chicago B. & Q. R.R. Co. v. City of Chicago,* 166 U.S. 226, 238-39, 17 S.Ct. 581, 585-86, 41 L.Ed. 979 (1896). Similarly, the Hawaii Constitution provides that "[p]rivate property shall not be taken or damaged for public use without just compensation." Haw. Const. art. I., § 20.

The landowners argue that Ordinance 91-95 is unconstitutional because it takes land for the benefit of private persons and, alternatively, that its public purpose is not served by its mechanism. As noted above, the Ordinance is similar to Hawaii's Land Reform Act of 1967[4] (the "Act"), which was upheld on public use grounds in *Hawaii Housing*

[4] The Act was designed to compel large landowners to break up their estates. Under the Act, tenants who lease and live on single-family residential lots within developmental tracts at least five acres in size can ask the Hawaii Housing authority ("HHA") to condemn the property on which they live. When half of the tenants in the tract, or 215 tenants, whichever is less, file an application, the HHA can acquire some or all of the lots in the Act by condemnation. The HHA then can sell the lots to the tenants.

Authority v. Midkiff, 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984). Because of the Ordinance's similarity to the Act, we begin our analysis with *Midkiff.*

In that case, the Supreme Court upheld the Act, concluding that Hawaii could constitutionally use its power of eminent domain to break up a land oligopoly. *Id.* at 241-42, 104 S.Ct. at 2329-30. The Supreme Court rejected the landowners' arguments that the Act violated the public use requirement of the Taking Clause.[5] The Court stated, "The 'public use' requirement thus is coterminous with the scope of a sovereign's police powers." *Id.* at 240, 104 S.Ct. at 2329.

Thus, as the Court noted, the judiciary's role in reviewing the legislature's judgment regarding public use is extremely narrow. *Id.* The judiciary should defer to the legislature's public use determination unless the use involves an "impossibility" or is "palpably without reasonable foundation." *Id.* at 240-241, 104 S.Ct. at 2329-30. The Court further noted that "where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause." *Id.* at 241, 104 S.Ct. at 2329-30.

Applying that test, the Court noted that the state legislature determined a land oligopoly existed in Hawaii. The Court reasoned that regulating the "oligopoly and the evils associated with it is a classic exercise of a State's police powers." *Id.* at 242, 104 S.Ct. at 2330. Even though the Act's result was to turn land over from one private owner to another, the Court held that the statute's purpose was sufficiently public, *See id.* at 241, 104 S.Ct. at 2329. Finally, the Court noted that using a lease-to-fee transfer statute to regulate that oligopoly was not irrational. *Id.* Accordingly, the Court upheld the Act.

The analysis under the Hawaii Constitution is similarly deferential to the legislature's public use determination.

> [O]nce the legislature has spoken on the social issue involved, so long as the exercise of the eminent domain power is rationally related to the objective sought, the legislative public use declaration should be upheld unless it is palpably without reasonable foundation. The crucial inquiry is whether the legislature might reasonably consider the use public, and whether it rationally could have believed that application of the sovereign's condemnation powers would accomplish the public use goal.

Hawaii Housing Authority v. Lyman, 68 Haw. 55, 704 P.2d 888, 897 (1985) (internal citation omitted).

In the present action, both district courts determined that *Midkiff* controlled the outcome of this dispute. Because the statute in *Midkiff* and Ordinance 91-95 are so similar, both courts found no merit in the Landowner's public use arguments. Before this court, the landowners seek to distinguish *Midkiff* on several grounds: (1) that the standard of review has changed since *Midkiff;* (2) that the public purpose of the Ordinance is not as compelling

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[5] The landowners in *Midkiff* were trustees of the Bishop Estate, the appellants in the *Richardson* action.

as the purpose asserted in *Midkiff;* and (3) that the means of effectuating the purpose is irrational in light of developments since *Midkiff.* We discuss each of these arguments.

1. Change in the standard of review

The landowners argue that, in light of *Dolan v. City of Tigard,* 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994), *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992) and *Nollan v. California Coastal Comm'n,* 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), the deference given in *Midkiff* to the legislative body's public use findings is inappropriate. The landowners assert that those cases require heightened scrutiny. We conclude that those cases are not applicable because they involved uncompensated regulatory takings, in which the issues are quite different.

In a regulatory taking case, the court must determine whether a putative regulatory action masks a taking. For example, in *Dolan,* the most recent case, a shop owner in Oregon brought suit against the City of Tigard. She had applied for a permit needed to expand her store and pave a parking area. *Dolan,* 512 U.S. at 379, 114 S.Ct. at 2313-14. The city's planning commission granted the permit application, but only on the condition that the shop owner dedicate to the city part of her property that was within a floodplain plus a 15 foot strip of land for use as a pedestrian pathway. *Id.* at 379-80, 114 S.Ct. at 2313-14. The shop owner filed suit alleging that the condition was an unconstitutional regulatory taking.

Dolan, as well as *Lucas* and *Nollan,* are quite different from the cases before us. At bottom, those cases involve balancing the authority of state and local governments to engage in land use planning against the property rights of individuals. *See Dolan,* 512 U.S. at 383-86, 114 S.Ct. at 2315-17. The primary issue is whether the landowner is to receive just compensation. *See e.g., id.* at 385, 114 S.Ct. at 2317 ("Under the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right here the right to receive just compensation when property is taken for a public use in exchange for a discretionary benefit conferred by the government where the property sought has little or no relationship to the benefit."). That is, if the Court would have upheld the putative regulatory actions in those cases, the landowners' property would have been subject to the challenged land restriction and the owner would not have been entitled to compensation for the diminution in land value. The heightened scrutiny applied in *Dolan* thus is necessary to prevent the government from using its regulatory power to force individuals to bear burdens that properly should be born by the public. *See id.*, at 389, 114 S.Ct. at 2319 ("We think this standard is too lax to adequately protect petitioner's right to just compensation if her property is taken for a public purpose.").

Conversely, in the cases before us, the government has expressly exercised its condemnation power and will compensate the landowners. Here, as in *Midkiff,* the requirement of just compensation ensures that individuals will not be forced to bear public burdens, which in all fairness should be borne by the public as a whole. Heightened scrutiny thus is inappropriate. The language used throughout *Midkiff* indicates that deference to the legislative body's public use determination is required when the taking is fully compensated. *See e.g., Midkiff,* 467 U.S. at 241, 104 S.Ct. at 2329-30 ("[W]here the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has

never held a compensated taking to be proscribed by the Public Use Clause."). For these reasons, we believe that *Nollan-Lucas-Dolan* trio does not signal a change from this long standing rule of deference because we see nothing inconsistent in applying heightened scrutiny when the taking is uncompensated, and a more deferential standard when the taking is fully compensated.

We hold, therefore, that the standard of review to be used in examining Ordinance 91-95 is the minimum scrutiny test espoused in *Midkiff.* We will defer to the City's determination regarding public use unless the use involves an "impossibility" or is "palpably without reasonable foundation." *Midkiff,* 467 U.S. at 240-41, 104 S.Ct. at 2329.

2. The rationality of the public purpose

Unlike the statute at issue in *Midkiff,* the Ordinance is not grounded on the desire of breaking up a land oligopoly. Rather, the City enacted the Ordinance to strengthen Oahu's economy and remedy perceived failures in its real estate market. The City found:

> There is a close relationship between the monetary values accorded land on Oahu and the stability and strength of Oahu's economy as a whole. Residential condominium, cooperative housing and planned development land values, artificially inflated by concentrated or single ownership, market conditions or other factors, skew Oahu's economy toward unnecessarily high levels. The pervasive and substantial contribution made to inflation by high residential condominium, cooperative housing and planned development land values creates a potential for economic instability and disruption on Oahu. Economic inflation, instability and disruptions on Oahu have real and potential damaging consequences for all members of an affected society. Checking inflation, improving the stability of the economy, and avoiding disadvantageous economic disruptions all are productive of general benefit to all members of Oahu's community.

Honolulu City & County, Haw. Ordinance 91-95 § 1 (a).

This purpose--remedying a failure in the real estate market and strengthening the economy--is a public purpose. *See Midkiff,* 467 U.S. at 242, 104 S.Ct. at 2330 (land oligopoly caused failure in real estate market; regulating evils associated with oligopoly is classic exercise of police power); *Berman v. Parker,* 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954) (affirming the constitutionality of the District of Columbia Redevelopment Act of 1945, which provided for the condemnation of slum areas for possible sale to private interests). The landowners contend, however, that the evidence presented to the City does not support the stated public purpose. They assert that, contrary to the City's findings, ownership of condominium units is not concentrated in the hands of large landowners and that landowners do sell proportionated shares of their fee simple titles. Thus, they argue that because the City incorrectly determined these facts, the findings do not support the Ordinance's stated public purpose.

Under the standard espoused in *Midkiff,* we must accept the public purpose of the Ordinance unless the City's findings are "palpably without reasonable foundation." *Midkiff*, 467 U.S. at 241, 104 S.Ct. at 2329. The City held three days of public hearings before enacting the Ordinance. The City determined that the price of condominiums was higher because the ownership of the fee simple titles to the land underneath the condominiums was excessively concentrated. While the hearings produced conflicting testimony, one study presented to the City showed that the largest 20 Landowners own 34.9% of the land under condominium units in Honolulu, and that the largest 60 own 50.4%. Legislative Reference Bureau, Report No. 6, *Ownership Patterns of Land Beneath Hawaii's Condominiums and Cooperative Housing Projects* 21 (1987) (Ownership Patterns). While the largest 20 landowners own a smaller percentage of land underneath condominiums than the largest 22 owned of the fee simple titles when the Court decided *Midkiff, see Midkiff,* 467 U.S. at 232, 104 S.Ct. at 2325, the concentration of ownership of land underneath condominiums is greater than the concentration of land ownership throughout the state at the time *Midkiff* was decided. *Compare Ownership Patterns* at 21 (60 persons own 50.4% of land under condominiums), with *Midkiff,* 467 U.S. at 232, 104 S.Ct. at 2325 (72 persons own 47% of land in Hawaii). We thus cannot say that the City's finding is without reasonable foundation.

Similarly, the evidence presented to the City regarding the amount of fee simple lands for sale underneath condominiums was conflicting. We are not free to substitute our judgment for that of the City. The evidence reviewed by the City adequately demonstrated that the land underneath the condominiums was not being sold and that the lack of such sales was driving up the price of housing in Honolulu. We therefore must accept the City's asserted public purpose because its findings are not without reasonable foundation. *See Midkiff,* 467 U.S. at 241, 104 S.Ct. at 2329 ("In short, the Court has made clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.' ") (citation omitted).

3. The reasonableness of the means used

The landowners also argue that, between 1987 and 1990, the price of condominiums in Hawaii increased by 66%. However, the price of single-family dwellings--which were subject to the Act's lease-to-fee provision--increased by 98%. Dep't of Business and Economic Dev., *The State of Hawaii Databook 1990: A Statistical Abtract* 549 (1990). Thus, the landowners argue that even if a lease-to-fee statute was reasonably related to eliminating a land oligopoly at the time of *Midkiff,* such means are not rationally related to remedying a failure in the real estate market and strengthening the economy in light of recent history.

Deference to the legislative body's public use determination is required " 'until it is shown to involve an impossibility.'" *Midkiff,* 467 U.S. at 240, 104 S.Ct. at 2329 (quoting *Old Dominion Co. v. United States,* 269 U.S. 55, 66, 46 S.Ct. 39, 40-41, 70 L.Ed. 162 (1925)). "Any departure from this judicial restraint would result in courts deciding on what is and is not a governmental function and in their invalidating legislation on the basis of their view on that question at the moment of decision, a practice which has proved impracticable in other fields." *United States ex rel. TY.A. v. Welch,* 327 U.S. 546, 552, 66 S.Ct. 715, 718,

90 L.Ed. 843 (1946). Additionally, in *Midkiff* the Court noted that whether the statute actually succeeds is irrelevant.

> But "whether in *fact* the provision will accomplish its objectives is not the question: the [constitutional requirement] is satisfied if . . . the . . . [state] Legislature *rationally could have believed* that the [Act] would promote its objective." When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings . . . are not to be carried out in the federal courts.

Midkiff, 467 U.S. at 242-43, 104 S.Ct. at 2330 (brackets in original) (quoting *Western & Southern Life Ins. Co. v. State Bd. of Equalization,* 451 U.S. 648, 671-72, 101 S.Ct. 2070, 2084-85, 68 L.Ed.2d 514 (1981)) (internal citations omitted).

Under the rational basis test, we hold that the Ordinance is constitutional under both the United States and Hawaii constitutions. Regardless of what has occurred with single-family dwellings, the City rationally could have believed that, if the supply of condominiums increased (through the lease-to-fee measure of Ordinance 91-95), the price of those condominiums would decrease. Additionally, although the price of single-family houses increased dramatically between 1987 and 1990, there is no indication that the price would not have gone up even more without the Act's lease-to-fee mechanism. Finally, even if the price of condominiums does not decrease as a result of the Ordinance, some of the public purposes of the Ordinance will be served. If a family is allowed to purchase its condominium, that family will not risk being thrown out of its home in 25 years because the family cannot afford the renegotiated rent. The City rationally could have concluded that the lease-to-fee mechanism would remedy defects in the housing market and stabilize Oahu's economy.

C. THE JUST COMPENSATION CLAUSE

When a government uses its powers of eminent domain to condemn property, it must provide the property owner with "just compensation." U.S. Const. amend V.; *accord* Haw. Const. art. I, § 20. Just compensation is the "full -monetary equivalent of the property taken." *United States v. Reynolds,* 397 U.S. 14, 16, 90 S.Ct. 803, 805, 25 L.Ed.2d 12 (1970).

The landowners argue that Ordinance 91-95 does not fully compensate them for the taking of their property. In particular, they argue that the Ordinance fails to provide compensation for their loss of rental income or for the diminution in the value of their remaining fee simple interest in any land that is involuntarily converted from their sole ownership to a cotenancy under the ordinance.[6] Both district courts dismissed these claims as unripe. *Richardson,* 802 F.Supp. at 341; *Small Landowners,* 832 F.Supp. at 1411.

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[6] Under the Ordinance, the Department has the option of condemning only a portion of the fee simple title under a condominium project (such as where some of the condominium lessors do not wish to purchase the fee simple title). In such a situation, the original land owner will share the fee simple title to the land with each condominium purchaser as a covenant.

Ripeness is a question of law reviewed *de novo*. *Carson Harbor Village Ltd. v. City of Carson,* 37 F.3d 468, 474 (9th Cir.1994). "If a claim is unripe, federal courts lack subject matter jurisdiction and the complaint must be dismissed." *Southern Pac. Transp. Co. v. City of Los Angeles,* 922 F.2d 498, 502 (9th Cir.1990). Whether a claim is ripe generally turns on the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. *Pacific Gas & Elec. Co. v. State Energy Resources Conserv. & Devel. Comm'n,* 461 U.S. 190, 201, 103 S.Ct. 1713, 1720, 75 L.Ed.2d 752 (1983). The "central concern [of the ripeness inquiry] is whether the case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all." 13A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3532 at 112 (2d ed. 1984).

Here, the Bishop Estate came to federal court the same day the City enacted the Ordinance. The condemnation procedure at issue is not self-executing. Rather, several events must occur before any taking will occur. First, at least 25 condominium owners or the owners of 50% of the units, whichever is less, must file an application with the Department to trigger the Ordinance's procedures. Then, after "[d]ue notice is given and a public hearing held," the Department must determine whether the "exercise of the power of eminent domain" requested by the applicants "will effectuate the public purposes of [the Ordinance]." Honolulu City & County, Haw. Ordinance 91-95 § 2.2 (a) (2). The Ordinance also requires that, before the Department exercises its power of eminent domain, that the lessor and lessees negotiate "the just compensation which" will be paid. Honolulu City & County, Haw. Ordinance 91-95 § 4.6. Only then will the Department set forth to condemn property.

At this juncture, no group of tenants has asked the Department to invoke the condemnation procedures created by the Ordinance. It is possible that any one of the conditions precedent to the exercise of the Department's eminent domain power might not occur. A sufficient number of qualifying tenants, *see* Honolulu City & County, Haw. Ordinance § 4.4 (setting forth seven requirements that lessee must meet before a sale takes place), might not file an application with the Department. The Department might conclude in any given case that exercising its power of eminent domain would not further the public purpose of the Ordinance. In any event, the required preliminary negotiations could result in an agreement as to the appropriate compensation. Because any one of these contingent events might not occur, we conclude that the landowners' claim under the Just Compensation clause is not ripe for federal adjudication.

The Supreme Court's clear guidance regarding application of the ripeness doctrine to takings claims reinforces our conclusion that the landowners' claim is not ripe. The Court has "placed two hurdles in the way of a takings claim brought in federal court against states and their political subdivisions." *Levald, Inc. v. City of Palm Desert,* 998 F.2d 680, 686 (9th Cir.1993) (internal quotation omitted). It is the second of these two hurdles, which requires that plaintiffs "seek compensation through the procedures the State has provided for doing so before turning to the federal courts," *id.* (internal quotation omitted), that has not been met here. Because no property has been targeted for taking, the landowners have not sought and been denied condemnation by the Department. Moreover, the landowners have not invoked the processes provided by Hawaii's courts for obtaining just compensation.

The landowners argue and the dissent concludes, however, that their claims are ripe because the Ordinance's plain language fails to provide for full compensation. Requiring the landowners to seek compensation through Hawaii's procedures, they argue, would be futile under existing state law. *See id.* at 686. The landowners burden of showing that complying with the state's procedures would be futile is a heavy one. *American Savings & Loan Ass'n v. County of Marin,* 653 F.2d 364, 371 (9th Cir. 1981). We conclude that the landowners have not carried their burden.

The Ordinance provides that "[t]he compensation to be paid . . . shall be the current fair market value of the leased fee interest." Honolulu City & County, Haw. Ordinance § 1.2. It defines "leased fee interest" as the "reversionary interests of the fee owner . . . other than the lessee's or sublessee's interest." *Id.* The dissent argues that the plain meaning of the Ordinance deprives the landowners of compensation for the lost stream of rental payments and, therefore, "unless the Ordinance means something other than "what it very clearly says, it does not authorize the Department to give landowners just compensation." *Dissenting Opinion* at 1170. We disagree.

The Ordinance speaks of "reversionary interests" as being in the plural. This points to a recognition of multiple factors to be included in the valuation. The Fifth Circuit has stated that a "reversionary interest is *any* future interest left in a transferor or his successor in interest." *United States v. 50.822 Acres of Land, More or Less,* 950 F.2d 1165, 1169 n. 4 (5th Cir.1992) (internal quotation omitted) (emphasis added). The Department could well interpret the "reversionary interests" of the fee owner as his entire interest in the land under the condominiums as of the date the eminent domain action is commenced.

Basic principles of property law, in fact, practically compel that interpretation. The reversionary interest of a lessor, as the dissent notes, is "[t]he property that reverts to the grantor after the expiration of an intervening income interest." *Blacks Law Dictionary* 1186 (5th ed. 1979). In other words, a reversionary interest is "[a] right to the future enjoyment of property, at present in possession or occupation of another." *Id.* The Ordinance thus directs the Department to pay the fair market value of the property which reverts to the lessor at the expiration of the lease. What reverts to the lessor is a fee interest in the ground underneath the condominium. The projected earning of that property would be a normal factor in determining the value of the property that reverts to the lessor. *See* Ordinance 91-95 at § 1.2 (defining fair market value as the price to which a willing buyer and seller taking into consideration "all uses to which the land is adapted or might in reason be applied").

We hold that the landowners' challenge is not ripe. There are obviously many different ways the Department could approach the valuation of the lessors' reversionary interest. The Department has not issued regulations regarding the compensation of the landowners and there is no basis for determining that the landowners will not be fully compensated for their interests. It is apparent that the "plain meaning" of the Ordinance does not foreclose the payment of constitutionally adequate compensation for the landowners' "reversionary interests." Moreover, the City's intent. to pay the current fair market value of the leased fee interest is clear. The Ordinance anticipates a complete valuation of the lessors' property interests. It is only if the definition of "leased fee interest" is given a restricted meaning that the landowners would not receive constitutionally adequate

compensation. Until that happens, federal adjudication of the landowners' just compensation claim is premature.

D. THE DUE PROCESS CLAUSE

The Due Process Clause of the Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV; accord Haw. Const. art I, § 5. The Due Process clause confers both procedural and substantive rights. *United States v. Salerno,* 481 U.S. 739, 746, 107 S.Ct. 2095, 2101, 95 L.Ed.2d 697 (1987); *Armendariz v. Penman,* 75 F.3d 1311, 1318 (9th Cir.1996) (en banc). A municipal act that neither utilizes a suspect classification nor draws distinctions among individuals that implicate fundamental rights will violate substantive due process rights when it is shown that the action is not "rationally related to a legitimate governmental purpose." *Munoz v. Sullivan,* 930 F.2d 1400, 1404 (9th Cir. 1991). We will strike down a statute on substantive due process grounds if it is arbitrary and irrational. *Del Monte Dunes v. City of Monterey,* 920 F.2d 1496, 1508 (9th Cir. 1990).

The landowners again argue that the Ordinance is arbitrary and irrational because it has no legitimate public purpose, because lease-to-fee statutes have been proved not to work, and because the Ordinance is not rationally related to achieving, a valid objective.

The challengers' burden to show that a statute is arbitrary- and irrational is extremely high. *See Del Monte Dunes,* 920 F.2d at 1508. "In a substantive due process challenge, we do not require that the City's legislative acts actually advance is stated purposes, but instead look to whether 'the governmental body could have had no legitimate reason for its decision.'" *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1234 (9th Cir.1994) (quoting *Levald, Inc.*, 998 F.2d at 690). As explained above, *see supra* section II(B) (2), the City has expressed a valid public purpose in attempting to control condominium price inflation. Furthermore, the City's decision to utilize a lease-to-fee ordinance to effectuate this purpose is not irrational. *See supra* section II(B) (3). Accordingly, we hold that the landowners cannot meet the burden of showing irrationality.

E. THE EQUAL PROTECTION CLAUSE

The United States Constitution guarantees that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend XIV; *accord* Haw. Const. art. I, § 5. The Bishop Estate and the Small Landowners assert that Ordinance 91-95 violates the Equal Protection Clause in two ways. First, the Bishop Estate alleges that ordinance 91-95 was enacted to favor non-Hawaiian lessees over Native Hawaiians and Native Hawaiian Trusts in violation of their equal protection rights. The Small Landowners additionally allege that the Ordinance violates their equal protection rights by "irrationally grouping together all condominium landowners without any factual or legal basis for inclusion of small landowners."

1. Native Hawaiians' equal protection claims

The Ordinance applies to condominiums regardless of whether the owner is Native Hawaiian or non-Hawaiian. It thus does not on its face draw a distinction on the basis of a suspect classification. Nonetheless, the landowners assert that the Ordinance is

unconstitutional due to its discriminatory effects. To prevail, however, the Bishop Estate must show not only a discriminatory effect, but also discriminatory intent. *Village of Arlington Heights v. Metropolitan Housing Dev. Co.*, 429 U.S. 252 265, 97 S.Ct. 555, 563, 50 L.Ed.2d 450, (1977).

The Bishop Estate introduced no evidence of discriminatory intent on the part of the City. Instead, the Estate alleged that the City must have known that it and other Native Hawaiians owned numerous interests in leased condominiums and therefore that the City was aware the Ordinance would severely affect the Bishop Estate Trust and would harm the interests of Native Hawaiians. We agree with Judge Ezra that these allegations, even if true, do not present a prima facie case of discrimination. It is not enough to show that the City knew the law would affect Native Hawaiians. "Discriminatory purpose . . . implies more than an awareness of consequences." *Personnel Adm'r v. Feeney,* 442 U.S. 256, 279, 99 S.Ct. 2282, 2296. 60 L.Ed.2d 87/0 (1979). Because the landowners offered no other evidence of discriminatory intent, summary judgment on their equal protection claim was appropriate.

2. Small Landowners' equal protection claim

The Small Landowners contend that the Ordinance violates their equal protection rights by grouping small landowners with owners such as the Bishop Estate, which owns many condominium projects. We disagree.

The Small Landowners do not contend they constitute a suspect class; hence, we will uphold the Ordinance if it is rationally related to a legitimate state interest. *See Massachusetts Bd. of Retirement v. Murgia,* 427 U.S. 307, 312, 96 S.Ct. 2562, 2566, 49 L.Ed.2d 520 (1976). As explained above, the Ordinance furthers a legitimate state interest. See supra section II(B)(2). The Ordinance is rationally related to that interest. *See supra* section II(B)(3). Thus we hold Ordinance 91-95 does not violate the Small Landowners' equal protection rights.

III. ORDINANCE 91-96

A. THE ORDINANCE

As noted above, the land underneath condominiums on Oahu ordinarily is owned by someone other than the owner of the condominium. The condominium owner leases the ground under the condominium, ordinarily for very long terms. In the typical lease, the rent initially is fixed for a term of years, after which the rent is subject to renegotiation. The renegotiated rent is normally a percentage of the fair market value of the land appurtenant to the unit exclusive of improvements, as of the date of renegotiation. The rapid rise in Hawaiian land prices often results in renegotiated rent several hundred times greater than the initial fixed rent.

Ordinance 91-96 was enacted at the same time as Ordinance 91-95 and essentially is a rent control 'ordinance. The Ordinance accomplishes its goal in two ways. First, the Ordinance, which applies to all leases that contain provisions for renegotiation of lease rents for owner-occupied condominiums, limits the number and regulates the timing of renegotiations. Section 1.4 of the Ordinance provides that the first renegotiation shall not

occur within fifteen years of the initial date of the lease, while subsequent renegotiations shall occur no sooner than every ten years.

Second, the Ordinance caps rents by linking the maximum renegotiated rent to the consumer price index. Section 1.5(b) of the Ordinance limits the renegotiated rent to the initial rent multiplied by a rent factor. The initial rent is the greater of the rent specified by the lease and the reasonable rental value on the effective date of the lease. Honolulu City and County, Haw. Ordinance 91-96. § 1. 1. The rent factor is the average consumer price index for the six-month period in which the rent renegotiation divided by the average consumer price index on the date of the initial lease. *Id.* § 1. 5 (b) (1)-(2).

The Ordinance also contemplates the conveyance of condominiums subject to renegotiated leases on the underlying land. Section 1.10 of the Ordinance facilitates the conveyance or transfer of these renegotiated leases. That section provides that, if an owner-occupant of a condominium conveys or transfers the leasehold interest in the underlying land during a renegotiated rent period to a person who intends to occupy the condominium apartment, the renegotiated land rent shall apply to the transferee tenant. *Id.* § 1.10. In other words, the owner-occupant of a condominium is free to convey his or her leasehold interest in the underlying land to a person intending to occupy the condominium and the transferee will receive the benefit of the renegotiated land lease. However, if the condominium is conveyed to someone who is not an owner-occupant, the lessor of the underlying land may reopen the negotiation. *Id.* § 1. 13.

The Bishop Estate moved for summary judgment, contending that Ordinance 91-96 violates the Takings, Contract and Due Process Clauses. The district court ruled, at summary judgment, that the Ordinance violates the Takings Clause. The district court did not reach the Bishop Estate's Contract and Due Process Clause arguments.

The City and the HALE coalition each filed a timely notice of appeal.

B. THE TAKINGS CLAUSE

The Bishop Estate argues that Ordinance 91-96 violates the Takings Clause in two ways. First, the Estate contends that Ordinance 91-96 fails to substantially further its stated public purposes and, therefore, constitutes a regulatory taking because the Ordinance allows a lessee to monetize a below-market renegotiated rent at the expense of the lessor. Second, the Bishop Estate asserts that the Ordinance violates the Fifth Amendment because it fails to provide for consideration of individualized factors that -might affect the value of the lease at the time of renegotiation. The City and HALE coalition argue that individualized consideration is not necessary and the alleged ground lease premium does not render the Ordinance unconstitutional. We turn to the Bishop Estate's argument that the Ordinance fails to substantially further a legitimate state interest.

A land use regulation, as noted above, does not effect a taking if it substantially furthers a legitimate state interest and does not deny the landowner economically viable use of his land. *Dolan,* 512 U.S. at 385, 114 S.Ct. at 2316-17. Ordinance 91-96 is designed to further the City's interest in maintaining affordable owner-occupied residential housing. Honolulu City & County, Haw. Ordinance 91-96, § 1. The Bishop Estate does not maintain that this is not a legitimate state interest, but rather asserts that the Ordinance fails to substantially further that interest. The Bishop Estate cites

Yee v. City of Escondido, 503 U.S. 519, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992) in support of its argument.

Yee involved a rent control ordinance enacted by the City of Escondido that capped the rent a mobile home park owner could charge his lessees. *Yee,* 503 U.S. at 524, 112 S.Ct. at 1526-27. The Yees, owners of two mobile home parks, brought suit alleging that the rent control ordinance violated the Takings Clause. *Id.* at 525, 112 S.Ct. at 1527. They offered two arguments in support of their contention: (1) the rent control ordinance effected a physical taking of their property; and (2) the ordinance effected a regulatory taking of their property.

The Court did not reach the regulatory taking issue because that question was "not fairly included in the question on which we granted certiorari." *Id.* at 533, 112 S.Ct. at 1531. With respect to their physical taking argument, the Yees relied "heavily on their allegation that the ordinance benefits incumbent mobile home owners without benefiting future mobile home owners, who will be forced to purchase mobile homes at premiums." *Id.* at 530, 112 S.Ct. at 1529. The Court pointed out that this premium effect distinguished the Escondido ordinance from ordinary rent control statutes. Apartment tenants do not sell anything to their successors and, quite often, are statutorily precluded from charging "key money." *Id.* The ordinary rent control ordinance does not allow the lessee to monetize the present value of the reduced rent by conveying an apartment subject to a lease with a below market rent. Although the Court ultimately rejected the Yees' argument because "it has nothing to do with whether the ordinance causes a physical taking," *id.*, it noted that "-[t]his effect might have some bearing on whether the ordinance causes a regulatory taking, as it may shed some light on whether there is a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance." *Id.* (citing *Nollan,* 483 U.S. at 834-35, 107 S.Ct. at 3147-48).

The Bishop Estate makes a similar challenge to Ordinance 91-96. It contends that the Ordinance's conveyance provisions create a premium, which an owner-occupant can capture when she sells a condominium subject to a renegotiated land rent. If the transferee intends to occupy the condominium, she receives the benefit of the renegotiated rent. Hence, the transferor will charge a premium reflecting the net present value of the difference between the renegotiated land rent and the free market land rent.

The district court found that the Ordinance allowed a lessee to capture the present value of the below market land rent. *Richardson II,* 802 F.Supp. at 338. The Ordinance's failure to regulate resales, according to the district court, effected a transfer of wealth from lessors to lessees. *Id.* Because of this transfer of wealth, which generally does not occur in the ordinary rent control ordinance, the court held that the Ordinance is unconstitutional. While we agree that the Ordinance effects a regulatory taking and, therefore is unconstitutional, we do so for somewhat different reasons than the district court.

The City enacted the Ordinance to provide renegotiated land lease rents "which are affordable to condominium apartment owner-occupants and fair to lessors" and to "maintain [affordable housing] for owner-occupants." The conveyance provision, as explained above, vitiates the cause-and-effect relationship between the property use restricted (rent rates) and the social evil the Ordinance seeks to remedy (lack of affordable housing). Despite this, the City and the Hale Coalition assert that it does not effect an

unconstitutional regulatory taking. They assert that all land use regulations increase the value of some property while decreasing the value of other property.

Initially, we must determine whether the Bishop Estate's takings claim is ripe. "There are two independent prudential hurdles to a regulatory taking claim brought . . . in federal court." *Suitum v. Tahoe Regional Planning Agency,* ____ U.S. ____, ____, 117 S.Ct. 1659, 1664, 137 L.Ed.2d 980 (1997). The first hurdle, that the plaintiff obtain a final decision regarding the application of the regulation to the property at issue from the entity charged with implementing the regulation, *id.* at ____, 117 S.Ct. at 1665, does not apply to facial regulatory takings claims. *Levald,* 998 F.2d at 686. Twice before we have characterized premium based challenges to a rent control statute as facial challenges. *See Carson Harbor,* 37 F.3d at 474 n. 5 ("In *Levald,* which involved similar facts, we noted that the premium is 'relevant only to a facial, not an as-applied, regulatory challenge.'"). The first hurdle thus does not apply to the Bishop Estate's argument.

"The second hurdle stems from the Fifth Amendment's proviso that only takings without 'just compensation' infringe that Amendment; 'if a State provides adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation clause until it has used the procedure and been denied just compensation.'" *Suitum,* ____ U.S. at ____, 117 S.Ct. at 1665 (quoting Williamson *County,* 473 U.S. at 195, 105 S.Ct. at 3121 (1985)). Because the Bishop Estate's argument that the Ordinance does not substantially further a legitimate state interest does not depend upon the extent to which the Estate is compensated, its facial regulatory taking claim is ripe. *See Yee,* 503 U.S. at 534, 112 S.Ct. at 1532 ("As this [premium argument] does not depend on the extent to which petitioners are deprived of the economic use of their particular pieces of property or the extent to which these particular petitioners are compensated, petitioners' facial challenge is ripe."). We therefore turn to the merits of the Bishop Estate's argument.

Land use regulations do influence the value of property, but to be constitutional, they must do so in a manner that substantially furthers a legitimate government interest. *Nollan,* 483 U.S. at 834, 107 S.Ct. at 3147. Ordinance 91-96 does not do this. It regulates the use of the lessors' property interests in a manner that does not substantially further the goal of creating affordable housing. The absence of a mechanism that prevents lessees from capturing the net present value of the reduced land rent in the form of a premium, means that the Ordinance will not substantially further its goal of creating affordable owner-occupied housing in Honolulu. Incumbent owner occupants who sell to those who intend to occupy the apartment will charge a premium for the benefit of living in a rent controlled condominium. The price of housing ultimately will remain the same. The Ordinance thus effects a regulatory taking. *See id.* (regulation must substantially advance a legitimate state interest); *see* also, *Pennell v. San Jose,* 485 U.S. 1, 20, 108 S.Ct. 849, 862, 99 L.Ed.2d 1 (1988)

("Traditional land-use regulation (short of that which totally destroys the economic value of property) does not violate the principle that one should not be forced to bear a burden which belongs to the public as a whole] because there is a cause-and-effect relationship between the property use restricted by the regulation and the social evil that,

the regulation seeks to remedy.") (Scalia, J., concurring). We accordingly hold that Ordinance 91-96 violates the Fifth Amendment to the Constitution of the United States.[7]

IV. CONCLUSION

In summary, we hold that Ordinance 91-95 (the lease to fee ordinance) is constitutional. The Ordinance admittedly takes private property, but it does so for a sufficiently public purpose and no constitutional deprivation has as yet been established. Ordinance 91-96 (the rent control ordinance), on the other hand, is unconstitutional because it to substantially further a legitimate governmental interest. The respective judgments of the district courts are therefore

AFFIRMED.

C'SCANNLAIN, Circuit Judge, concurring in part and dissenting in part.

I join the court's opinion regarding the constitutionality of Ordinance 91-96. With respect to Ordinance 91-95, 1 concur in the court's conclusion in Part II-B that there is no violation of the Public Use Clause, but write separately to express concern about *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984). I respectfully dissent from Part II-C, however, because I believe that the challenge to Ordinance 91-95's compensation provision is ripe, and that the provision does not provide just compensation.

I

In Part II-B the court concludes that Ordinance 91-95 does not violate the Public Use Clause and relies heavily on *Hawaii Housing Authority v. Midkiff.*

A

The Fifth Amendment to the Constitution states: ". . . nor shall private property be taken for public use without just compensation." U.S. Const., amend V. The Public Use Clause is an explicit limit on the power of the government to take private property for, as the Supreme Court has long recognized, a taking must be for public use; a taking for a purely private use is unconstitutional. *See Thompson v. Consolidated Gas Corp.,* 300 U.S. 55, 80, 57 S.Ct. 364, 376, 81 L.Ed. 510 (1937).

Notwithstanding this principle, however, the Supreme Court in *Midkiff* gave the Public Use Clause an exceedingly broad reading: to satisfy the Clause, a taking need only be "rationally related to a conceivable public purpose." *Midkiff,* 467 U.S. at 241, 104

[7] In light of our conclusion that Ordinance 91-96 fails to substantially further a legitimate state interest, we need not reach either the Bishop Estates argument that it fails to provide for consideration of the characteristics of individual lessors or its other arguments.

S.Ct. at 2329. "The 'public use' requirement is thus coterminous with the scope of a sovereign's police powers." *Id* at 240, 104 S.Ct. at 2329; *Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 422-24, 112 S.Ct. 1394, 1404-05, 118 L.Ed.2d 52 (1992).

Since *Midkiff* was decided, however, the Supreme Court's regulatory takings jurisprudence has undergone considerable change. *See Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987). *Nollan, Lucas,* and *Dolan,* of course, dealt with a different area of takings jurisprudence, subject to a different set of rules than the one before us: here we have a challenge under the Public Use Clause whereas that trio dealt with regulatory takings.

Notwithstanding that the *Nollan-Lucas-Dolan* trio dealt with a different part of the Takings Clause, the landowners argue that these cases have modified *Midkiff's* deferential review of a legislature's public use determination. The court rejects this argument, and I agree: the *Nollan-Lucas-Dolan* trio does not expressly modify or overrule *Midkiff,* and therefore we must apply *Midkiff* in this case. Indeed, recent Ninth Circuit authority confirms that *Midkiff* is still viable. *See Bay View, Inc. v. AHTNA, Inc.*, 105 F.3d 1281, 1286 (9th Cir.1997) ("After [*Midkiff*], a legislative determination of what constitutes 'public use' is subject to 'an extremely narrow' review, and will be upheld so long as it's rational."). *Midkiff's* deferential standard compels me to conclude that Ordinance 91-95's taking serves a "conceivable public purpose."

B

Although *Midkiff* has not been overruled, and although *Nollan, Lucas,* and *Dolan* deal with a different part of the Takings Clause, I nevertheless believe that there is tension between these two lines of authority. The underlying thrust of the *Nollan-Lucas-Dolan* decisions--increasing the scrutiny of regulations to determine if they go "too far" (enough to require compensation)--is inconsistent with *Midkiff's* sweeping deference. It may be time for the Supreme Court to reconsider *Midkiff.*

To provide the context for this observation, I must take a brief detour. It seems to me that, speaking in broad terms, there are three ways the government can exercise control over property, especially real property. First, it can regulate pursuant to its broad police powers. Second, it can use its power of eminent domain to take the property without the consent of the owner as long as it pays just compensation. Third, it can buy land from a voluntary seller after negotiating a price-that is, it can use its revenues to behave like any other arm's length purchaser of private property. *See* Thomas W. Merrill, *The Economics of Public Use,* 72 Cornell L.Rev. 61, 72 (1986).

Nollan, Lucas, and *Dolan* dealt with the relationship between the first two categories. *Lucas* established when a government regulation goes too far. *See Lucas,* 505 U.S. at 1030, 112 S.Ct. at 2901 ("When . . . a regulation that declares "off-limits" all economically productive or beneficial uses of land goes beyond what the relevant background principle would dictate, compensation must be paid to sustain it."). *Nollan* and

Dolan tightened the required fit between the legitimate purpose sought to be accomplished by a government regulation and the means chosen-thereby identifying some exercises of the police power as takings. A police power regulation will be treated as a taking-an exercise of eminent domain-requiring compensation unless it adequately fits its purposes; that is, unless there is an "essential nexus" between a legitimate state interest and the regulation. *See Dolan*, 512 U.S. at 385-87, 114 S.Ct. at 2317; *Nollan,* 483 U.S. at 837, 107 S.Ct. at 3148-49.

The *Nollan-Lucas-Dolan* trio therefore established that the Takings Clause is a limitation upon the state's police powers; if a regulation goes too far, or does not have the right fit. then it must be treated as an exercise of eminent domain-a taking-which requires compensation. The Public Use Clause appears to serve the same sort of function, but with respect to the second and third categories--it limits the state's power of eminent domain. If an exercise of eminent domain goes too far-if it is for a private purpose, not a public one-then it cannot stand. If the state wants to acquire property in such circumstances (and has the statutory authority to do so), it may negotiate with the landowner to purchase the property at an agreed price, but it may not use its condemnation power.[8]

Because the *Nollan-Lucas-Dolan* trio increased the level of scrutiny given to police power regulations, identifying some of them as takings, it stands to reason that the same increased scrutiny should be given to outright condemnation. If a taking does not have the required fit-perhaps something like *Nollan's* "essential nexus"-between its proclaimed public use and its actual effect, then it should be invalid under the Public Use Clause.

The court's opinion seeks to distinguish these cases, but I am unpersuaded. To the majority, the distinction is the provision of compensation: "[W]e see nothing inconsistent in applying heightened scrutiny when the taking is uncompensated, and a more deferential standard when the taking is fully compensated." Whereas the majority is correct that there is less reason to be suspicious of a fully compensated taking than an uncompensated one, more deference does not imply absolute deference. We ought not vitiate the public use requirement because, even if a landlord does receive the "fair market value" of the property, the landlord loses his right to exclude. Whether because of a sentimental attachment to his property or a conviction that the property is actually worth more than what the market will currently bear, a landlord might choose not to sell, even at the "fair market value." The landlord who refuses to sell is asserting his right to exclude. As the *Dolan* Court recognized, "th[e] right to exclude others is 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Dolan,* 512 U.S. at 393, 114 S.Ct. at 2320 (quoting *Kaiser Aetna v. United States,* 444 U.S. 164, 176, 100 S.Ct. 383, 391, 62 L.Ed.2d 332 (1979)). The public use requirement protects this right by limiting government encroachment on private property-by forcing the government to prove that it is upholding the public welfare and not merely transferring wealth to a class of persons with a stronger political voice.

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[8] This is not to say that the Public Use Clause prohibits the government from possessing property for a non-public use; if the government with the statutory power to do so purchases the property from a voluntary seller, there is no taking at all because there is no use of eminent domain. The government becomes the owner with the consent of the seller.

Therein lies the mischief of *Midkiff*. Hopefully the Supreme Court will have the opportunity to extend its emerging takings jurisprudence to protect the right to exclude and to add vitality to the public use requirement. If the Clause is to have any effect at all, it must mean that a court will not feign blindness when it sees through a patently transparent legislative recital that a taking is for a public use. When the government uses eminent domain to take real property from A and give it to B, with no meaningful impact on anyone else or on the community at large, the taking is purely private and should violate the Public Use Clause.

In my view, Ordinance 91-95, unlike the statute in *Midkiff*, is a purely private taking. In *Midkiff*, the legislature was attempting to break up an oligopoly in land ownership remnant of Hawaii's feudal past--to allow single family home ownership. Breaking apart large blocks of land held by a small group of landowners--blocks which encompassed almost half the entire State of Hawaii could be reasonably expected to spark more land transactions and lead to a more fluid real estate market. *See Midkiff*, 467 U.S. at 232-33, 104 S.Ct. at 2324-25. That some economists might disagree with the legislature's remedy does not mean that the statute would be invalid--it retained an "essential nexus" to its purpose and would be constitutional.

In this case, however, the Honolulu City Council found no land oligopoly, but a mere concentration of land ownership in the hands of landowners (a tautology), many of whom refused to sell their land to their leasehold tenants (typically groups of high-rise condominium owners), which in turn led to increased real property prices. As a remedy, when properly triggered, Ordinance 91-95 would condemn the property of the landowners and transfer it in pro rata shares to the condominium owners. It seems to me that the ordinance is nothing more than a naked transfer from one property owner to another from landlords to tenants. To be sure, because tenants will be able to own land that they could not purchase in the open market, the ordinance might well make today's tenants better off, and will certainly eliminate their need to pay rent altogether. But transferring title to the tenants will not change the value of the property—which will still equal the combined value of the leasehold interest and the reversionary interest and hence should not lower the price a seller will demand. If the landlords constituted an oligopoly, then the division of the ownership of the land could have the effect of lowering land prices from an oligopolistic level to something approaching the free-market level. In the absence of a showing of an oligopoly, however, Ordinance 91-95 has nothing to do with changing the structure of Hawaii's real estate market.

Nevertheless, *Midkiff*'s language limits the public use inquiry to whether there is a conceivable public purpose behind the law. Applying that deferential standard, I conclude that Ordinance 91-95 barely passes muster, and therefore I reluctantly concur in the court's conclusion that it does not violate the Public Use Clause.

II

In Part II-C of its opinion, the court concludes that the landowners' compensation claims are not ripe. It does so -while theoretically recognizing the well-established rule that a party need not seek compensation when doing so would be

futile under existing state law. *See Levald, Inc. v. City of Palm Desert,* 998 F.2d 680, 686 (9th Cir. 1993); *see also Williamson County Regional Planning Comm'n v. Hamilton Bank,* 473 U.S. 172, 196-97, 105 S.Ct. 3108, 3121-22, 87 L.Ed.2d 126 (1985).

Ordinance 91-95 sets the compensation for the taking as "the current fair market value of the leased fee interest." Ordinance 91-95, § 5.3. It defines the "leased fee interest" as the "reversionary interests of the fee owner." *Id.* at § 1.2.

By its plain meaning, the ordinance pays only the current fair market value of the landowner's reversionary interest. In other words, the landowner gets paid only for his interest in the property which excludes the leasehold. Conspicuously absent from this formula is any payment for the current stream of rental payments from the tenants to the landlord. Undoubtedly, the landlord has a protected property interest in the rental payments-a lessor's interest distinct from the reversionary interest in the land. Currently, the tenants pay rent to the landlord for the lease term. Under the ordinance, the tenants stop paying rent immediately upon condemnation. The landlord loses the stream of payments for the leasehold period but is not compensated for the loss.

In the court's view, Honolulu's Department of Housing and Community Development could interpret the compensation provision broadly and include the lost rental payments in the compensation formula. I do not think a fair (or even generous) reading of the ordinance will sustain that conclusion. The ordinance is clear: the landowners will get paid only for their "reversionary interests," which, as a matter of basic property law, do not include the current income from the property. *See Black's Law Dictionary* 1186 (5th ed. 1979) (defining "reversionary interest" as "[t]he property that reverts to the grantor after the expiration of an intervening income interest"). The Supreme Court has recognized that merely compensating a lessor for the reversionary interest is insufficient:

> "[W]hen a lease of trust land is made. . . . upon a subsequent condemnation by the United States, the trust must receive the then full value of the reversionary interest that is subject to the outstanding lease, *plus, of course, the value of the rental rights under the lease."*

Alamo Land & Cattle Co., Inc. v. Arizona, 424 U.S. 295, 303, 96 S.Ct. 910, 916, 47 L.Ed.2d 1 (1976) (emphasis added). The landlord must receive the value of the leased payments because that is the difference between what is taken by the government (a present fee simple) and the fair market of the "reversionary interests."

The court reaches the incorrect result because its analysis is incomplete. After noting that what reverts back to the landlord is a fee interest, the court states that "[t]he projected earning of that property would be a normal factor in determining the value of the property that reverts to the lessor." The court is correct in that what reverts back is a fee interest, and that the value of a fee interest takes into account all projected earnings. The court does not recognize, however, that a reversionary interest in fee simple is a lesser estate than a present fee simple, and that the difference is the interim lease payments. One can view the value of property as the sum of the discounted *future* cash flows. A reversionary interest is less valuable than a present fee simple because the value of a

reversionary interest does not include the rent payments made prior to reversion, as those would be *past* cash flows.

Thus, to provide just compensation, Hawaii must pay the landlords the value of the reversionary interest plus the present value of the lease payments. There is no need to wait and see how the Department administers Ordinance 91-95, for unless the ordinance means something other than what it very clearly says, it does not authorize the Department to give landowners just compensation. In light of the plain meaning of the ordinance, any compensation paid by Honolulu to the landowners would be constitutionally inadequate. The formality of pursuing such compensation would therefore be futile. For that reason, would conclude that the landowners' compensation claims are ripe for review, and that the district court's order should be reversed to that extent.

APPENDIX B

UNITED STATES DISTRICT COURT
D. HAWAII

Civ. No. 91-00725 DAE

WILLIAM S. RICHARDSON, *et al.*,
Plaintiffs,

V.

CITY AND COUNTY OF HONOLULU,
and Defendant,

HALE COALITION,
Intervenor.

Sept. 16, 1992

ORDER GRANTING IN PART AND DENYING IN PART MOTIONS FOR SUMMARY JUDGMENT AND CERTIFYING QUESTION TO HAWAII SUPREME COURT

DAVID ALAN EZRA, District Judge.

This court heard the parties' motions for summary judgment on August 10, 1992.

BACKGROUND

On December 4, 1991, the City Council of defendant City and County of Honolulu[1] passed Bills 156 (1990) and 36 (1991) which were later enacted on December 18, 1991 as Ordinances 91-95 and 91-96, respectively. Ordinance 91-95 involves a mechanism for the transfer of the fee simple interest of leasehold property from condominium lessors to condominium lessees in Honolulu. Ordinance 91-96 imposes a ceiling on renegotiated lease rents for ground leases of owner-occupied residential condominium units in Honolulu.

On December 18, 1991, the date of enactment of the aforementioned ordinances, the plaintiff Trustees of the Kamehameha Schools/Bernice Pauahi Bishop

[1] 'The court will refer to the City and County of Honolulu as "Honolulu" when discussing the geographical location and as "the City" when addressing the defendant political entity.

Estate ("Bishop Estate") filed the present action alleging that both ordinances are unconstitutional. Bishop Estate asserts, the following specific causes of action:

> Count I--Deprivation of constitutional rights in violation of 42 U.S.C. § 1983;
>
> Count II--Ordinance 91-96 is facially unconstitutional in that it eff6cts an impermissible taking in violation of the Fifth and Fourteenth Amendment;
>
> Count III--Ordinance 91-96 is facially unconstitutional. in that it violates Bishop Estate's substantive due process rights under the Fifth and Fourteenth Amendments;
>
> Count IV--Ordinance 91-96 is facially unconstitutional in that it violates Bishop Estate's procedural due process rights under the Fourteenth Amendment;
>
> Count V--Ordinance 91-96 is facially unconstitutional in that it violates Bishop Estate's equal protection rights under the Fourteenth Amendment;
>
> Count VI--Ordinance 91-96 unreasonably and substantially impairs Bishop Estate's contract rights in violation of Article I, Section 10 of the Constitution;
>
> Count VII--Ordinance 91-95 is facially unconstitutional in that it effects an impermissible taking in violation of the Fifth and Fourteenth Amendments;
>
> Count VIII-Ordinance 91-95 is facially unconstitutional in that it violates Bishop Estate's substantive due process rights under the Fifth and Fourteenth Amendments;
>
> Count IX--Ordinance 91-95 is facially unconstitutional in that it violates Bishop Estate's equal protection rights under the Fourteenth Amendment;
>
> Count X--Ordinance 91-96 violates several provisions of the Constitution of the State of Hawaii;
>
> Count XI--Ordinance 91-95 violates several provisions of the Constitution of the State of Hawaii;
>
> Count XII--Ordinance 91-96 conflicts with various statutes of the State of Hawaii; and
>
> Count XIII-Ordinance 91-95 conflicts with various statutes of the State of Hawaii.

Bishop Estate seeks declaratory relief as well as attorneys' fees, costs, and interest.

On February 14, 1992, Bishop Estate filed a motion for partial summary judgment on Counts I, II, III, VI, XII, and XIII. On June 8, 1992, the HALE Coalition filed a motion for partial summary judgment on the remaining counts of the complaint. On June 9, 1992, the City filed a cross motion for summary judgment on all counts.

DISCUSSION

I. ORDINANCE 91-96

A. BACKGROUND

Ordinance 91-96 imposes a ceiling on renegotiated lease rents for ground leases of owner-occupied residential condominium units in Honolulu. In the "Findings and Purpose" section of Ordinance 91-96, the City found that there were 25,203 owner-occupied condominium housing units in Honolulu in 1987. Ord. 91-96 § 1 (1) (A). The City further found that 16,291 of such units, or approximately 65% of the total, were on leased land.[2] *Id.* § 1 (1)(B). The City indicated that residential leaseholds have had, and continue to have, numerous undesirable socio-economic effects including: increases in lease rental negotiations of up to 1,000%; inequality of bargaining power favoring lessors; and increasing lease rentals forcing lessees to give up their leases and look for other accommodations. In sum, the City stated:

> The purpose of this Ordinance is to set maximum renegotiated lease rents which are affordable to condominium apartment owner-occupants and fair to lessors. This Ordinance is intended to be in conformance with *[Richardson I]*.[3]

Ordinance 91-96 applies to all leases that contain provisions for renegotiation of lease rents for individual residential owner-occupant apartments. Ord. 91-96 § 1.3. An "owner-occupant" is defined as an owner of a residential apartment who, on the date of renegotiation of the lease of the residential apartment, occupies the residential apartment as the owner's principal residence. *Id.* § 1.2(a). Pursuant to the ordinance, the first renegotiation shall not be scheduled before the fifteenth year following the initial date of the lease and subsequent renegotiations shall occur no more frequently than every ten years. *Id.* § 1. 4 (a) (1).

Ordinance 91-96 provides that the maximum annual renegotiated lease rent shall be the initial lease rent multiplied by a rent factor. *Id.* § 1.5(b). The "initial lease rent" is

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[2] The City indicated that it had no reason to believe that this data had changed appreciably since 1987. Ord. 91-96 § 1(2).

[3] In *Richardson v. City and County of Honolulu*, 759 F.Supp. 1477 (D.Haw.1991) *("Richardson I")*, this court declared unconstitutional Ordinance 91-96's predecessor, Ordinance 90-95. *Richardson* I is discussed at length later in this opinion.

the greater of the beginning lease rent specified in the lease or the reasonable market value rent prevailing at the effective date of the lease.[4] *Id.* § 1. 1. Furthermore, the "rent factor" is the average consumer price index ("CPI")[5] for the six-month period in which the rent negotiation occurs divided by the average CPI in effect at the time of the effective date of the initial lease rent. *Id.* § *1.5 (b).*

When a lease comes up for renegotiation, the lessor and lessee are encouraged to attempt to reach agreement as. to the renegotiated lease rent. *Id.* § 1.4(b). If the parties are unable to reach an agreement, however, they must proceed to arbitration. *Id.* If the lease at issue is subject to section 516D-12 of the Hawaii Revised Statutes, the arbitration shall proceed pursuant to chapter 516D. *Id.* Otherwise, the City Department of Housing and Community Development (the "Department") shall arbitrate the matter. *Id.* The Department is also charged with enforcing the provisions of Ordinance 91-96. *Id.* § 1. 14.

Ordinance 91-96 also provides a mechanism for adjusting the renegotiated lease rent biennially in order to account for further changes in the CPI. *Id.* § 1.6. Furthermore, under certain narrowly-defined circumstances, the ordinance allows for an administrative adjustment of annual renegotiated lease rent to an amount higher than the maximum annual renegotiated lease rent. *Id.* § 1.7. In general terms, a lessor may petition the Department for an administrative adjustment when the lessor pays the operating expenses from lease rent proceeds and the lessor's current net operating income is less than the lessor's net operating income in the last year of the fixed rent period. *Id.* § 1.7(c). When authorized, the lease rent shall be adjusted so that the net operating income, as adjusted for inflation measured by the CPI, stays the same as the net operating income in the last year of the fixed rent period. *Id.* § 1.7(b), (c). Either the lessor or lessee may appeal the Department's approval, or modification of a proposed adjusted lease rent. *Id.* § 1.7(g).

Every renegotiated lease rent, whether set by agreement or arbitration, must be submitted to the Department for certification that the rent is within the applicable maximum. *Id.* § 1.9. The renegotiated lease rent shall be deemed within the maximum unless, within thirty days of the submission of the renegotiated lease rent, the Department certifies that such rent is not within the maximum. *Id.* § 1.9(d). If the Department rejects the proposed renegotiated lease rent, the lessor and lessee must continue their renegotiation. *Id.*

Any party aggrieved by the Department's action or inaction may appeal to the Department. *Id.* § 1.9(e). Upon the filing of an appeal, the Department shall (1) hold a

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[4] In the definition of "initial lease rent," the ordinance states that initial lease rent "excludes any lease rents that reflect reduced rent at the beginning of the lease due to construction of the project or due to special negotiations between the developer and the land owner." Ord. 91-96 § 1.1.

[5] CPI is defined as "the Consumer Price Index for All Urban Consumers (CPI-U) for Honolulu published by the Bureau of Labor Statistics of the United States Department of Labor." Ord. 91-96 § 1.1.

hearing in accordance with the contested case procedures of Chapter 91 of the Hawaii Revised Statutes, and (2) issue an appropriate decision.[6] *Id.*

If an owner-occupant transfers his leasehold interest during a renegotiated rent period to another person intending to be an owner-occupant, the renegotiated lease rent shall be applicable to the new owner-occupant. *Id.* § 1.10. However, if an apartment owner ceases to be an owner-occupant or if an owner-occupant transfers his leasehold interest to a person who is not an owner-occupant, the lessor may reopen the negotiated lease rent. *Id.* § 1.12, 1.13. Once reopened, the renegotiated lease rent must be set in accordance with the lease agreement and without regard to the provisions of Ordinance 91-96. *Id.*

B. THE TAKINGS CLAUSE (COUNT II)

1. Richardson I

In *Richardson v. City and County of Honolulu,* 759 F.Supp. 1477 (D.Haw.1991) *("Richardson I"),* this court considered the constitutionality of Ordinance 91-96's statutory predecessor, Ordinance 90-95. This court held that Ordinance 90-95 violated the Takings Clause of the United States Constitution. As the City drafted Ordinance 91-96 so as to attempt to correct the constitutional deficiencies of Ordinance 90-95, it is necessary to review *Richardson I.*

Ordinance 90-95 was designed to impose a maximum ceiling on renegotiated lease rents for residential condominiums in Honolulu. The ordinance provided that the renegotiated annual ground rent shall not exceed the initial lease rent paid at the beginning of the lease term multiplied by a "rent factor." *Richardson I,* 759 F.Supp. at 1479. The rent factor was an average of an "inflation factor" and an "income factor." *Id.* The lessors were bound by the rent figure determined by this formula regardless of whether the initial rent paid by the lessee reflected the market value of the property at the time. the lease began. *Id.* at 1480.

The court further explained:

> The maximum renegotiated rents mandated by the Ordinance apply for the full renegotiated rent period and are not readjusted to reflect changes in the [indexes for the inflation and income factors] which might occur during that time. The Ordinance does not take into consideration the location or any other unique or particular characteristics of the property. There is no administrative procedure for appeal, and no governmental body has been established or designated in the Ordinance for

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[6] The drafters of Ordinance 91-96 apparently attempted to take into account the potential conflict between Hawaii Revised Statutes chapter 658 which governs the finality of arbitration awards and section 1.9 of Ordinance 91-96. Section 1.9(f) provides that if a court of competent jurisdiction rules, or the state attorney general or corporation counsel opines, that a renegotiated lease rent set by arbitration may be vacated, modified, or corrected only pursuant to chapter 658, then a petition seeking such action shall be subject to chapter 658 and the parties may not appeal to the Department.

> the purpose of interpreting and applying the Ordinance's provisions.

759 F.Supp. at 1480.

The court held that Ordinance 90-95 was unconstitutional under the Fifth Amendment's Takings Clause because: (1) the ordinance did not allow lessors a reasonable rate of return; and (2) the ordinance's means did not rationally further its public purpose.

The court found that Ordinance 90-95 on its face deprived lessors of a just and reasonable rate of return because the rent ceiling was based on the amount of rent paid by the lessee during the first year of the lease. 759 F.Supp. at 1489. The undisputed evidence in the case showed that the rent paid by lessees during the first year of their leases was often far below market value. *Id.* at 1490. The court further determined that Ordinance 90-95 was unconstitutional because it did not provide a mechanism for periodic review of the rent ceilings imposed in order to ensure that lessors are continuously afforded a fair rate of return. *Id.* at 1491.

Additionally, while the court found that Ordinance 90-95 had a legitimate public purpose, it determined that the ordinance did not reasonably further the ordinance's goal of reducing the cost of leasehold housing for the people of Hawaii. 759 F.Supp. at 1493. The evidence in the case demonstrated that the ordinance applied to numerous types of condominiums which are not rented by lessees seeking residential housing. *Id.* at 1494. In fact, the evidence showed that only about 37% of all residential leasehold condominiums on Oahu were owner-occupied. As Ordinance 90-95 applied only to renegotiated annual ground rents, the court noted that it was inapplicable to sublessees who are the majority of the occupiers of condominiums.

The court summarized the problems of Ordinance 90-95 as follows:

> To the extent that the drafters intended to provide renters with more affordable housing, the approach chosen by the drafters of Ordinance 90-95 is not constitutionally rational, First, the Ordinance does not place any restrictions on rents charged to occupants by sublessors. Sec7ond, the terms of the Ordinance apply not only to residential condominiums but also to commercial condominiums. Third, the Ordinance does not take into consideration the individual characteristics or market value of any piece of property in determining the maximum allowable renegotiated rent. Finally, no governmental agency has been designated to interpret the Ordinance, oversee its application, or evaluate whether the rent ceiling is reasonable in every case.

759 F.Supp. at 1494.

While the court determined that Ordinance 90-95 was unconstitutional, the court noted:

> Careful review and analysis of constitutional law and precedent convinces this court that a properly crafted ordinance, the purpose of which is to limit lease rent increases, can pass constitutional muster. . . . This court *does* not hold that *every* effort to regulate rent renegotiations would be unconstitutional. Rather, the court finds that *this particular ordinance is* unconstitutionally overbroad.

Id. at 1479, 1488.

2. General Taking Analysis

The Takings Clause of the Fifth Amendment to the United States Constitution states that "private property [shall not] be taken for public use, without just compensation." The Takings Clause applies to the states through the Fourteenth Amendment. *Hawaii Housing Authority v. Midkiff, 467* U.S. 229, 244 n. 7, 104 S.Ct. 2321, 2331 *n. 7,* 81 L.Ed.2d 186 (1984). Moreover, a state may delegate its power to condemn to a municipality. Cf. *Jacobson v. Tahoe Regional Planning Agency,* 566 F.2d 1353 (9th Cir.1977), *aff'd in part and rev'd in part on other grounds,* 440 U.S. 391, 99 S.Ct. 1171, 59 L.Ed.2d 401 (1979). "When the power to condemn has been delegated to a municipality, the municipality acts under color of state law, and therefore the prohibitions of the fifth and fourteenth amendments apply." *Richardson I,* 759 F.Supp. at 1487.

The Supreme Court has consistently distinguished "physical takings" from "regulatory takings." A physical taking occurs when a governmental entity authorizes a permanent physical occupation of real property. On the other hand, the regulatory taking issue typically arises when a government regulation, such as a zoning regulation or a rent control law, affects a property owner's ability to use his land. The distinction between a physical taking and a regulatory taking is significant because the Supreme Court has applied vastly different standards to the two types of takings.

3. Physical Taking

The Supreme Court addressed at length the issues regarding a physical taking in *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982). In that case, the defendant cable television company installed a cable on the roof of the plaintiff's apartment building. The company's actions were in accordance with a New York law which required a landlord to permit a cable television company to install its cable facilities upon his property. The issue in the case was "whether a minor but permanent physical occupation of an owner's property authorized by government constitutes a 'taking' of property for which just compensation is due under the Fifth and Fourteenth Amendments of the Constitution." *Id.* at 421, 102 S.Ct. at 3168. The Supreme Court held that any permanent physical occupation constitutes" a per se taking thereby requiring just compensation. *Id.* at 426-441, 102 S.Ct. at 3170-79.

The instant case does not involve an actual permanent physical occupation as was present in *Loretto.* Nonetheless, Bishop Estate relies on a series of decisions from the courts of appeals which held that certain mobile home park rent control ordinances effected "physical takings," similar to the type of taking in *Loretto.* These ordinances

allegedly transferred possessory rights in the mobile home park from the owners to the tenants by essentially giving tenants a transferable right to a perpetual lease at below-market rental rates. *See Azul Pacifico, Inc. v. City of Los Angeles,* 948 F.2d 575 (9th Cir.1991), *opinion withdrawn on other grounds,* 973 F.2d. 704 (9th Cir. 1992);[7] *Pinewood Estates v. Barnegat Township Leveling Bd.,* 898 F.2d 347 (3d Cir.1990); *Hall v. City of Santa Barbara,* 833 F.2d 1270 (9th Cir.1986), *cert. denied,* 485 U.S. 940, 108 S.Ct. 1120, 99 L.Ed.2d 281 (1988).

The physical taking analysis in the aforementioned cases, however, was overruled by the Supreme Court's recent opinion in *Yee v. City of Escondido,* ____ U.S. ____, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992). *In Yee,* the plaintiff mobile home park owners challenged a local mobile home park rent control ordinance. The park owners alleged that the ordinance constituted a physical taking under *Loretto.*[8] Rejecting the owners' arguments, the Supreme, Court held that a physical taking occurs only when the government requires the landowner to submit to the physical occupation of his land. *Id.* 112 S.Ct. at "1529. The Court emphasized that the mobile home park owners voluntarily rented their land to the tenants; the park owners' tenants were invited by the park owners, not forced upon them by the government. *Id.* The Court explicitly rejected the rationale of Hall and *Pinewood Estates. Id.* at 1527 ("We granted certiorari . . . to resolve the conflict between the decision below [dismissing the complaint] and those of two of the federal Courts of Appeals in Hall [and *Pinewood Estates.*]).

Additionally, the Court found that the factual circumstances in *Yee* were similar to the case of *FCC v. Florida Power Corp.,* 480 U.S. 245, 107 S.Ct. 1107, 94 L.Ed.2d 282 (1987). In that case, the plaintiff utility company leased space on its utility poles to cable television companies for the installation of cables. Pursuant to federal agency action, the annual rent of several cable companies was reduced from between $7.15-$5.50 per pole to $1.79 per pole annual rent. Rejecting the utility's physical taking argument, the Supreme Court explained:

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[7] In *Azul-Pacifico,* the Ninth Circuit granted a petition for rehearing and withdrew its previous decision reported at 948 F.2d 575. On rehearing, the court did not address the takings clause issues, but it vacated the lower court's judgment on other grounds. In particular, the court held: (1) the plaintiff could not bring a direct constitutional claim without utilizing 42 U.S.C. § 1983; and (2) the claims were barred by the statute of limitations.

[8] The Court summarized plaintiffs' argument as follows:

> Because under the California Mobilehome Residency Law park owner cannot evict a mobile home owner or easily convert the property to other uses, the argument goes, the mot home owner is effectively a perpetual tenant of the park, a the increase in the mobile home's value thus represents right to occupy a pad at below-market rent indefinitely. And because the Mobilehome Residency Law permits the mobile home owner to sell the mobile home in place, the mobile homeowner can receive a premium from the purchaser corresponding to this increase in value. The amount of this premium is not limited by the Mobilehome Residency Law or the Escondido ordinance. As a result, petitioners conclude, the rent control ordinance has transferred a discrete interest in land—the right to occupy the land indefinitely at a sub-market rent--from the park owner to the mobile home owner. Petitioners contend that what has been transferred from park owner mobile home owner is no less than a right of physical occupation of the park owner's land.
>
> 112 S.Ct. at 1528.

> [The utility contends,] in essence, that it is a taking under *Loretto* for a tenant invited to lease at a rent of $7.15 to remain at the regulated rent of $1.79. But it is the invitation, not the rent, that makes the difference. The line which separates these cases from *Loretto* is the unambiguous distinction between a commercial lease and an interloper with a government license.

Pursuant to the Supreme Court's holdings in *Florida Power* and *Yee*, this court finds that there is no physical taking in the present case. In support of their physical taking allegation, Bishop Estate relies almost entirely on *Hall*, *Pinewood Estates*, and *Azul-Pacifico*. Yet the physical taking rationale of these cases was specifically rejected *in Yee*. Moreover, the condominium lessees in the present case are entirely analogous to the tenants in *Florida Power* and *Yee*. The lessees are occupying their condominiums as a result of leases extended by the lessors, not as a result of governmental mandate. The City did not require the lessors to be subject to physical occupation of their land.

4. Regulatory Taking

a) Applicable Law

The long-standing rule regarding regulatory takings was enunciated by Justice Holmes: "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 160, 67 L.Ed. 322 (1922). With respect to the regulation of housing, the Supreme Court has indicated:

> This Court has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all injuries that such regulation entails. . . . So long as these regulations do not require the landlord to suffer the physical occupation of a portion of his building by a third party, they will be analyzed under the multi-factor inquiry generally applicable to nonpossessory governmental activity.

Loretto v. Teleprompter Manhattan CATV Corp., 458 U * S. 419, 440, 102 S.Ct. 3164, 3178, 73 L.Ed.2d 868 (1982) (citing, among others, the following two rent control cases: *Bowles v. Willingham*, 321 U.S. 503, 64 S.Ct. 641, 88 L.Ed. 892 (1944); and *Block v. Hirsh*, 256 U.S. 135, 41 S.Ct. 458, 65 L.Ed. 865 (1921)).

The seminal case regarding regulatory takings is *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). In that case, pur-

suant to the City of New York Landmarks Preservation Law,[9] the Grand Central Terminal ("Terminal"), owned by plaintiff Penn Central Transportation Company ("Penn Central"), was designated as a historical landmark. After Penn Central's proposal to build a 55-story office building on top of the Terminal was rejected,[10] it filed suit alleging that the application of the Landmarks Preservation Law to the terminal constituted a "taking" in violation of the Fifth and Fourteenth Amendments.

The Supreme Court held there was no taking. The Court explained that the taking analysis involves essentially ad hoc, factual inquires involving several factors. 438 U.S. at 124, 98 S.Ct. at 2659. The Court indicated that a court must consider the economic impact of the regulation on the plaintiff, the extent to which the regulation has interfered with distinct investment-backed expectations, and the character of the government action. *Id.*

The Supreme Court rejected Penn Central's argument that the Landmarks Preservation Law effected a taking because its operation significantly diminished the value of the Terminal site. 438 U.S. at 131, 98 S.Ct. at 2662. Of particular importance, the Court noted that Penn Central had conceded that the parcel of land occupied by the Terminal was, at the time of the lawsuit, capable of earning a reasonable return. *Id.* at 129, 98 S.Ct. at 2661. Accordingly, the Court held that while the Landmark Preservation Law undeniably interfered with Penn Central's profit-making ability, the law still afforded Penn Central a reasonable return on its investment. 438 U.S. at 136-37, 98 S.Ct. at 2665-66.

While *Penn Central* provides the general framework for evaluating a regulatory taking claim, subsequent federal and state cases have refined the analysis with respect to rent control laws. A rent control scheme must guarantee efficient landlords/lessors a just and reasonable rate of return on their investments. *Pennell v. City of San Jose*, 485 U.S. 1, 13, 108 S.Ct. 849, 858, 99 L.Ed.2d 1 *(1988); Cromwell Assocs. v. Newark,* 511 A.2d 1273, 1275 (N.J.Super.Ct.Law Div.1985) (rejecting any percentage limitation on a landlord's ability to seek rent increases under a landlord hardship provision). In addition to the just and reasonable rate of return requirement, rent control legislation must substantially advance legitimate public interests. *Richardson I,* 759 F.Supp. at 1493 (citing *Agins v. City* of *Tiburon,* 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980)).

b) Individualized Consideration

As indicated above, this court set forth four reasons in *Richardson I* why the approach of Ordinance 90-95, Ordinance 91-96's predecessor, did not substantially advance the purpose of the law. One of the stated problems with Ordinance 90-95 was that "the Ordinance [did] not take into consideration the individual characteristics or market value of any piece of property in determining the maximum allowable renegotiated rent."

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[9] The City of New York enacted the Landmarks Preservation Law which created a commission having the power to designate historic landmarks in New York City. Once a site is designated as a landmark numerous restrictions attach to the property owner's use of the property. In order to partially offset the effect of these restrictions, landmark owners who have not developed their property to the extent otherwise allowed by the general zoning laws are allowed to transfer their development rights to other parcels in the vicinity. 438 U.S. at 109-114, 98 S.Ct. at 2651-54.

[10] Penn Central would have received $1-3 million annually from the proposed project.

Richardson I, 759 F.Supp. at 1494-96. In drafting Ordinance 91-96, the City failed to adequately address this significant defect.

The requirement of individualized consideration is apparent from other cases which have addressed taking issues. For example, in *Midkiff,* the United States Supreme Court upheld the State of Hawaii's Land Reform Act of 1967. Yet the Land Reform Act allowed the parties affected by the condemnation to present evidence of the fair market value of the subject property. *Midkiff,* 467 U.S. at 234 & n. 2, 104 S.Ct. at 2326 & n. 2 (citing Haw. Rev.Stat. § 516-56); *see also Richardson I,* 759 F.Supp. at 1494-96.

With respect to taking challenges to rent control laws, courts have recognized:

> The very nature of rent control requires that a limit be, placed on rent increases. Such limits have been held valid providing a safety valve, such as a hardship mechanism, exists which can assure, an efficient landlord a fair return . . . . .. [E]very rent control ordinance must be deemed to intend, and will be so read, to permit property owners to apply to the local administrative agency for relief on the ground that the regulation entitles the owner to a just and reasonable return."

Cromwell Assocs. v. Newark, 511 A.2d 12731 1275 (N.J.Super.Ct.Law Div.1985) (citing and quoting Hutton Park Gardens v. West Orange Town Council, 68 N.J. 543, 350 A.2d 1 (1975)).

Recent cases which have upheld rent control laws have involved statutes which provided for some degree of individualized consideration. For instance, under the rent control scheme in *Pennell v. City of San Jose,* 485 U.S. 1, 108 S.Ct. 849, 99 L.Ed,2d 1 (1988), when a tenant objected to a landlord's proposed rent increase, a hearing Officer would determine the reasonableness of the proposed increase. *Id.* at 5, 108 S.Ct. at 853. The rent control ordinance required that the hearing officer examine "the history of the premises, the landlord's costs, and the market for comparable housing." *Id.* at 13, 108 S.Ct. at 858. The ordinance also allowed the landlord to present any other relevant financial evidence pertaining to the property. *Id.*

Moreover, even rent control schemes which have been declared unconstitutional have typically contained some mechanism for individualized consideration. *See, e.g., Birkenfeld v. City of Berkeley,* 17 Cal.3d 129, 130 Cal. Rptr. 465, 493, 550 P.2d 1001, 1029 (1976) (landlords may petition rent control board for a rent adjustment); *Cromwell Assocs.,* 511 A.2d at 1274 (rent control ordinance permitted board-approved increases in cases where the proofs demonstrate that a particular hardship forecloses on a landlord's ability to obtain a fair rate of return defined by the ordinance as an 11.5% return on investment).

In *Yee v. Escondido,* ____ U.S.____, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992), the mobile home rent control ordinance in question prohibited rent increases without the approval of the city council. *Id.* 112 S.Ct. at 1527. However, mobile home park owners were allowed to apply for a rent increase at any time. *Id.* The city council was required to approve any increases which it deemed "just, fair, and reasonable" after considering a non-

exclusive list of eleven factors most of which pertained to the individual mobile home pads at issue. *Id.*

In contrast to the aforementioned cases, absolutely nothing in Ordinance 91-96's regulatory scheme accounts for the many unique factors, such as the rate of development in surrounding areas, which may affect the value of an individual parcel of real property at the time of renegotiation. At the hearing, the City conceded this fact.[11] To reiterate, the maximum annual renegotiated lease rent under the provisions of Ordinance 91-96 is determined solely on the basis of the *initial lease rent* and the *rent factor derived from the CPI.* The problem of lack of individual consideration in determining the renegotiated lease rent is compounded by the absence of any mechanism, such as a variance, for obtaining relief for special circumstances. *See Cromwell Assocs. v. Newark,* 511 A.2d 1273.4 1275 (N.J.Super.Ct.Law Div. 1985) (discussing the need for a safety valve or hardship mechanism with respect to rent control laws).

Ordinance 91-96's lack of individualized consideration is further exacerbated by the notable absence of any meaningful review process. *See Birkenfeld v. City of Berkeley,* 17 Cal.3d 129, 130 Cal.Rptr. 465, 550 P.2d 1001 (1976). In *Birkenfeld,* the California Supreme Court recognized that even when a rent control ordinance provides adequate standards for determining rental rates, the ordinance must provide procedural safeguards against unfairness in situations where the statutorily-determined rate would be unfair. *Id.* 130 Cal.Rptr. at 493-97, 550 P.2d at 1029-32.

The arbitration and appeal process in Ordinance 91-96 is focused exclusively on determining the correct initial lease rent and the rent factor from which the maximum annual renegotiated lease rent is calculated. The ordinance does *not* permit the arbitrator or the Department of Housing and Community Development to consider any other factors. At the hearing on these motions, the City conceded that the arbitration and appeal procedures are restricted to solely determining whether the maximum annual renegotiated lease rent is calculated properly under the statutory formula.

A review of the arbitration and appeal mechanism of Ordinance 91-96 reveals its inadequacies. If the lessor and lessee are unable to agree on an renegotiated lease rent, the parties must proceed to arbitration. Ord. 91-96 § 1.4(b). In arbitration, however, the arbitrator is restricted to determining the maximum renegotiated lease rent pursuant to the ordinance's formula of initial lease rent multiplied by the rent factor. *Id.* § 1.5. The arbitrator has no authority or discretion to consider any other factors in determining the maximum renegotiated lease rent. Furthermore, while all renegotiated lease rents must be certified by the City Department of Housing and Community Development, the Department's role is

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[11] The City argued that individual considerations are accounted for in the setting of the initial lease rent at the time the lease is originated. While this may be true, the individual characteristics of a piece of property often are significantly different at the time of renegotiation than they were at the initial date of the lease which could be several decades earlier. This court need only call attention to the massive redevelopment presently underway in the Kakaako area and the planned substantial redevelopment of the Honolulu waterfront. Both of these redevelopment projects are within the City and County of Honolulu and will without question have a marked effect on property values in condominiums within, abutting, or in the vicinity of these areas.

similarly restricted to merely ensuring compliance with the statutory formula for determining maximum renegotiated lease rent. *Id.* § 1.9.[12]

The City contends that lessors are ensured a fair rate of return by Ordinance 91-96's two types of adjustments: (1) the biennial adjustment for inflation (§ 1.6); and the administrative adjustment for increased operating expenses (§ 1.7). The court finds that neither of these adjustments provides the type of relief which is constitutionally mandated.

The biennial adjustment allows the previously determined maximum renegotiated lease rent to increase in accordance with the average consumer price index. Ord. 91-96 § 1.6. However, if the maximum renegotiated lease rent is originally set at a confiscatory rate, the biennial adjustment provides no relief from that confiscatory rate.[13] In other words, if the renegotiated lease rent is originally set at a confiscatory rate, the biennial adjustment merely prevents that confiscatory rate from becoming even more confiscatory by attempting to adjust the rate for inflation.

With respect to the administrative adjustment, that provision only applies if the lessor pays the operating expenses for the condominium exclusively from the lease rent proceeds. Ord. 91-96 § 1.7 (c) (2), (d) (3). However, the uncontradicted evidence before the court indicates that lessors "almost never assume the obligation to pay a condominium project's operating expenses, and if such an obligation is assumed, the expenses are not paid exclusively from lease rent proceeds, but are paid through separate charges." Aff. of Paul J. Cathcart ¶ 3 (attached to Bishop Estate Mot. Partial Summ. J. filed 2/14/92). Thus, the court finds that the administrative .adjustment provision is largely irrelevant.

Accordingly, the court finds that Ordinance 91-96 violates the Fifth Amendment's Takings Clause because it does not provide for consideration of individual factors which may affect the value of a particular parcel of real property at the time of renegotiation. Furthermore, Ordinance 91-96 is infirm because it does not account for situations in which the renegotiated lease rent formula does not provide the lessor with a fair rate of return. In other words, there is no meaningful mechanism for obtaining relief when the lease rent formula results in a confiscatory rate.

c) Ground Lease Premium

In addition to Ordinance 91-96's lack of individualized consideration, Bishop Estate also argues that the ordinance fails to substantially advance its public purpose because it allows a lessee to monetize a below-market rate renegotiated lease rent at the expense of the lessor. Pursuant to Ordinance 91-96, if an owner-occupant transfers his

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[12] In addition, any party aggrieved by the Department's action or inaction may appeal to the Department under the contested case procedures of chapter 91 of the Hawaii Revised Statutes. Ord. 91-96 § 1.9(e). Nonetheless, on appeal, there is no evidence to suggest that the Department has the authority to provide any form of relief other than ensuring compliance with Ordinance 91-96's rent formula. Furthermore, this appeal process may be nullified if a court rules, or the State attorney general or the City corporation counsel opines, that the right to appeal to the Department conflicts with chapter 658 of the Hawaii Revised Statutes.

[13] Additionally, the court notes that the lessor is not automatically entitled to the biennial adjustment; the Department must approve such an adjustment. Ord. 91-96 § 1.6(a). As Ordinance 91-96 contains no standards for the Department to apply in determining whether to grant a biennial adjustment, the Department apparently has unlimited discretion to either grant or deny a biennial adjustment.

leasehold interest in a residential condominium unit to another person intending to be an owner-occupant, the renegotiated lease rent is assigned and applicable to the new owner-occupant.[14] Ord. 91-96 § 1.10. Bishop Estate contends that this provision allows an owner-occupant with a below-market rate renegotiated lease rent to sell his condominium and receive a monetary premium for the below-market rate lease rent.

In the mobile home rent control cases discussed above, the various ordinances all contained provisions which allowed tenants to transfer their rights to below-market rental rates to other buyers. *See Yee v. Escondido,* U.S. ____, 112 S.Ct. 1522, 1528-30, 118 L.Ed.2d 153 (1992); *Azul Pacifico, Inc. v. City of Los Angeles,* 948 F.2d 575, 581-82 (9th Cir.1991), *opinion withdrawn on other grounds,* 973 F.2d 704 (9th Cir.1992); *Pinewood Estates v. Barnegat Township Leveling Bd.,* 898 F.2d 347 (3d Cir.1990); *Hall v. City of Santa Barbara,* 833 F.2d 1270, 1278-80 (9th Cir.1986), *cert. denied,* 485 ____ U.S. 940, 108 S.Ct. 1120, 99 L.Ed.2d 281 (1988). The courts in those cases uniformly recognized the constitutional concerns inherent in such schemes.

The problem with rent control plans which permit the tenant to transfer his right to below-market rates is the tenant's ability to command a premium for his right. *See generally,* Werner Z. Hirsch & Joel G. Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol,* 35 UCLA L.Rev. 399 (1988). In the mobile home cases, the premium represented the right to occupy the mobile home pad at a below-market rate. In the present case, the premium would represent the lessee's right to a below-market rate renegotiated ground lease rent. Thus, the right to receive the premium between the rent-controlled rate and the market rate is transferred from the landlord/ lessor to the tenant/lessee; this interest is worth the capitalized value of the difference between market rent and the controlled rent.

In *Hall,* the Ninth Circuit recognized the numerous Supreme Court cases which have upheld rent control laws. 833 F.2d at 1278.& nn. 19-20. The court commented, however, that none of the cases upholding rent control involved a situation in which the tenant could transfer his right to below-market rental rate to others in order to reap a monetary windfall. *Id.* The court emphasized:

> This is not a minor difference; it is crucial. The fact that the tenant can sell his interest to third parties drastically affects the economic realities of the landlord/tenant relationship. The typical rent control statute modifies the landlord/tenant relationship somewhat to protect tenants from perceived evils of the free-enterprise system. .
>
> That tenants normally cannot sell their rights in rent controlled property provides important safeguards for landlords. . . . If [tenants] are denied the right to cash out, tenants can enjoy the

[14] The court notes that the renegotiated lease rent is not assignable if an owner-occupant transfers his leasehold interest to a new owner who does not intend to be an owner-occupant. Ord. 91-96 § 1.13. Nonetheless, this fact does not alleviate the problems associated with assignments to new owners who do intend to be owner-occupants.

> benefits of rent control only so long as they remain tenants, not beyond. When the premises become vacant, the landlord is able to reassert a measure of control over the property.

Id. at 1279.

The Third Circuit also adopted the reasoning of *Hall* in *Pinewood Estates*. In the spring of 1992, the Supreme Court commented on the premium issue in *Yee v. Escondido*, ____ U.S. ____ 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992).[15] The Supreme Court in *Yee* indicated that while the rent control premium issue was not relevant to a physical taking argument, the factor was likely relevant with respect to a regulatory taking analysis.[16] ____ U.S. at ____, ____, 112 S.Ct. at 1528, 1530. In particular the court explained:

> [The mobile home park owners] are correct in citing the existence of this premium as a difference between the alleged effect of the Escondido ordinance and that of an ordinary apartment rent control statute. Most apartment tenants do not sell anything to their successors (and are often prohibited from charging "key money"), so a typical rent control statute will transfer wealth from the landlord to the incumbent tenant and all future tenants. By contrast, [the mobile home park owners] contend that the Escondido ordinance transfers wealth only to the incumbent mobile home owner. This effect might have some bearing on whether the ordinance causes a regulatory taking, it may shed some light on whether there is a sufficient nexus between the effect of the ordinance and objectives it is supposed to advance. . . . But it has nothing to do with whether the ordinance causes physical taking.

112 9.0. at 1530 (bold added).

In the present case, the court finds that the principles relating to "premiums" in the mobile home context are applicable to the condominium market.[17] Like mobile home park tenants, owner-occupants of leasehold condominiums own their housing unit, the condominium itself, but lease the underlying land. Moreover, the below-market rate lease rent which applies to the mobile home tenants and leasehold condominium owner-occupants is transferable to subsequent purchaser of the mobile home pad or condominium. With respect to both mobile homes and condominiums, the availability of a below-market rate lease rent necessarily increases the value of the subject housing unit,

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[15] As mentioned in the physical taking discussion above, the Supreme Court in Yee rejected the notion set forth in Hall and Pinewood Estates that the mobile home rent control laws effected a physical taking. 112 S.Ct. at 1528-31.

[16] The Court declined to fully address the regulatory taking claim because that issue was not included in the question on which certiorari was granted. 112 S.Ct. at 1531-34.

[17] While Ordinance 91-96 has not yet been in operation, the court notes that the "premium" argument is ripe because this case involves a facial challenge to the ordinance. In *Yee*, the Supreme Court held that an analogous facial challenge was ripe. 112 S.Ct. at 1532.

thereby allowing a seller to command a premium upon the sale of the housing unit. This transfer of wealth problem is generally not a concern in the area of apartment rent control because apartment rentals do not involve the ownership component present in mobile homes or condominiums.[18]

The court finds that Ordinance 91-96 enables an owner-occupant to charge a premium, in connection with the sale of a leasehold condominium with a below-market rate renegotiated lease rent, thereby operating to transfer value from the lessor to the lessee/seller. In light of the reasoning of the aforementioned mobile home park cases, and the analogous effects of the mobile home park laws regarding rent control and Ordinance 91-96, the court finds that the availability of the premium and the resulting transfer of wealth from the lessor to the lessee under Ordinance 91-96 violates the Taking Clause.[19]

II. ORDINANCE 91-95

A. BACKGROUND

Ordinance 91-95 involves a mechanism for the transfer of the fee simple interest of leasehold property from condominium lessors to condominium lessees in Honolulu. In the "Findings and Purpose" section of Ordinance 91-95, the City found that there are approximately 16,000-17,000 residential condominium, cooperative and planned development units on leased land on Oahu.[20] Ord. 91-95 § 1. The City further found that the owners of such leased land had generally refused to sell proportionate shares in the land underlying such units. *Id.* As a result of this practice, the City determined that there exists "a serious shortage of fee simple residential condominium land, cooperative housing unit land and planned development land and [ ] an artificial inflation of the value of such land on Oahu." *Id.*

Accordingly, the City concluded that owners of condominiums on leased land should be able to acquire the proportionate share of leased land underlying their units at a fair and reasonable price. *Id.* In order to accomplish this objective, the City decided to use its eminent domain power to condemn the fee simple title to the land underlying

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[18] The Hirschs elaborate:

> If a rent control ordinance [pertaining to apartments] allowed alienation of a tenant's rights and benefits under rent control, presumably apartment tenants could gain a benefit similar to the placement value given to mobile home park tenants. A "key money" (money spent to obtain a rent controlled apartment, usually illegally) feature to apartment rent controls might give the tenant a similar ability to monetize the benefits of rent control.

Hirsch & Hirsch, *supra*, at 425 n. 87.

[19] As the court finds Ordinance 91-96 to be unconstitutional under the Taking Clause, it need not address Bishop Estate's due process (Counts III and IV), equal protection (Count V), contracts clause (Count VI), or state law claims (Counts X and XII) claims regarding Ordinance 91-96.

[20] For the sake of simplicity, the court will refer to all condominium apartments, cooperative housing units, and planned development units covered by Ordinance 91-95 as "condominiums," unless otherwise indicated. While the court recognizes the legal distinctions between these forms of apartment ownership, such distinctions are not relevant to the issues at hand.

condominiums, pay just compensation to the lessors/owners of such land, and sell the land to the condominium owners. *Id.*

The City Department of Housing and Community Development ("Department") is charged with administering, enacting appropriate rules, and enforcing Ordinance 91-95. Ord. 91-95 §§ 1.7, 1.8. Article 2 of Ordinance 91-95 governs the condemnation of condominium development leaseholds.[21] The condemnation procedures are triggered once at least twenty-five of the condominium owners within the development or the owners of 50% of the condominium units, whichever is less, apply to the Department to purchase the leased fee interest. *Id.* § 2.2 (a)(1). After such an application, the Department must publish notice and hold a public hearing to determine whether the acquisition of the leased fee interest will effectuate the public purposes of the ordinance. *Id.* at § 2.2 (a) (2).

Within twelve months after the Department has designated a condominium development, or portion thereof, for acquisition, the Department must institute eminent domain proceedings unless the parties voluntarily agree to a sale of the property. Ord. 91-95 § 5.2. The compensation to be paid for the acquired property shall be the fair market value of the leased fee interest determined as of the date of the summons of the complaint in the eminent domain proceeding. *Id.* at 5.3.

After the City has acquired the subject land, authorized condominium lessees must purchase the underlying land within sixty days of acquisition. *Id.* § 2.3. In order to be eligible to buy the leased land, a purchaser must satisfy a list of seven requirements. *Id.* § 2.4.

B. TAKINGS CLAUSE (COUNT VII)[22]

1. Hawaii Housing Authority v. Midkiff

As Ordinance 91-95 involves leasehold conversion via eminent domain, the *court. notes* that this general issue has been thoroughly addressed by the Supreme Court in a very similar case, *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984). In that case, the plaintiffs challenged the State of Hawaii's Land Reform Act of 1967 which created a mechanism for condemning residential lots occupied by single-family homes on which the underlying land was leased, and transferring ownership of, the condemned fees simple to the lessees. As Ordinance 91-95 is modeled after the Land Reform Act, many of the procedural aspects of the Land Reform Act are similar, if not identical, to the provisions of Ordinance 91-95 as explained above.[23]

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[21] Articles 3 and 4 contain similar provisions relating to cooperative housing development leaseholds and residential planned development leaseholds, respectively.

[22] The court notes that much of the, law regarding the Takings Clause has been discussed above with respect to Ordinance 91-96. Accordingly, the court will not repeat the general discussion of Takings Clause law.

[23] The Supreme Court explained the method of condemnation under the Land Reform Act as follows:

The Supreme Court in *Midkiff* rejected the plaintiffs' arguments that the Land Reform Act violated the "public use'" requirement of the Fifth Amendment's Takings Clause. The Court explained that its role in reviewing the legislature's judgment regarding public use is extremely narrow. 467 U.S. at 240, 104 S.Ct. at 2329 (citing *Berman v. Parker*, 348 U.S. 26, 32, 75 S.Ct. 98, 102, 99 L.Ed. 27 (1954)). The Court indicated that it would defer to the legislature's public use determination unless the use involves an "impossibility" or is "palpably without reasonable foundation." *Id.* 467 U.S. at 240-41, 104 S.Ct. at 2329-30. The Court further noted that "where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause." *Id.* at 241, 104 S.Ct. at 2329.

Accordingly, the Supreme Court upheld the Land Reform Act. The Court recognized that the Hawaii Legislature had determined that a land oligopoly existed and that such concentration was the cause of several types of local problems. *Id.* at 241-42, 104 S.Ct. at 2329-30. The Court reasoned that regulation of an "oligopoly and the evils associated with it is a classic exercise of a State's police powers." *Id.* at 242, 104 S.Ct. at 2330.

The Court further found that the Land Reform Act's approach to correcting the land oligopoly problem was not irrational. *Id.* The Court elaborated:

> [The Land Reform Act,] like any other, may not be successful in achieving its intended goals. But "whether *in fact* the provision will accomplish its objectives is not the question: the [constitutional requirement] is satisfied if . . . the . . . [state] Legislature *rationally could have believed* that the [Act] would promote its objective." When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings no less than debates over the wisdom of other kinds of socio-economic legislation are not to be carried out in the federal courts. Re-distribution of fees simple to correct deficiencies in the market determined by the state legislature to be attributable to land oligopoly is a rational exercise of the eminent domain power. Therefore, the Hawaii statute must pass the scrutiny of the Public Use Clause.

Under the Act's condemnation scheme, tenants living on single-family residential lots within developmental tracts at least five acres in size are entitled to ask the [HHAJ to condemn the property on which they live. When 25 eligible tenants, or tenants on half the lots in the tract, whichever is less, file appropriate applications, the Act authorizes HHA to hold a public hearing to determine whether the acquisition by the State of all or part of the tract will "effectuate the public purposes" of the Act. If HHA finds that these public purposes will be served, it is authorized to designate some or all of the lots in the tract for acquisition. It then acquires, at prices set either by condemnation trial or by negotiation between lessors and lessees, the former fee owners' full "right, title, and interest" in the land.

After compensation has been set, HHA may sell the land titles to tenants who have applied for fee simple ownership.

467 U.S. at 242-43, 104 S.Ct. at 2330.

2. The Present Case

In light of the Supreme Court's holding and reasoning in *Midkiff* as well as the similarity between the Land Reform Act and Ordinance 91-95, the court finds little merit to Bishop Estate's taking argument regarding Ordinance 91-95. Bishop Estate argues that the public purpose of Ordinance 91-95 is without reasonable foundation. In particular, Bishop Estate maintains that the ordinance is based on the incorrect assumption that a concentration of land ownership currently exists with respect to land leased for condominiums which is similar to the oligopoly which justified the Land Reform Act in the single-family home context. Bishop Estate contends that there is no concentration of land ownership in relation to leased land underlying condominium projects.

The court finds no merit to this argument. The Supreme Court in *Midkiff* repeatedly emphasized the substantial deference which should be accorded to the relevant legislative body in the area of public use. 467 U.S. at 239-43, 104 S.Ct. at 2328-31. In the present case, the City Council determined that ownership of land beneath residential condominium projects is concentrated in the hands of owners who have refused to sell proportionate shares in their fee simple titles to lessees residing in the condominium units. Ord. 91-95 § 1. Thus, the City Council's primary concern was apparently the inability of the owners of leasehold condominiums to purchase proportionate shares of the underlying fee simple title. While the current concentration of land ownership with respect to leasehold condominiums may not be as drastic as the land oligopoly which prompted the Land Reform Act,[24] this contention does not undermine the City's determination that permitting leasehold condominium owners to purchase the underlying property serves a legitimate public purpose.

Bishop Estate also argues that Ordinance 91-95 fails to provide lessors with just compensation. It claims that they are entitled to severance damages for the partial condemnation of their leased land. It also contends that Ordinance 91-95 fails to exclude the effects that Ordinance 91-96 has on the valuation of the leased fees.

Bishop Estate's argument regarding just compensation is untenable. As section 5.3 of Ordinance 91-95 provides for payment of compensation equivalent to "the current fair market value of the leased fee interest," the ordinance clearly comports with the constitutional requirements for just compensation. *See United States v. Reynolds*, 397 U.S. 14, 16, 90 S.Ct. 803, 805, 25 L.Ed.2d 12 (1970).[25] Any arguments as to the proper manner

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467 U.S. at 233-34, 104 S.Ct. at 2325-26 (citations and footnotes omitted).

[24] Nonetheless, the court notes that Bishop Estate's own filings reveal that in 1987 the land underlying 45% of the condominium projects in Hawaii was owned by only 51 lessors. Bishop Estate Mot. Summ. J. filed 2/14/92, Ex. CC, at ii. Furthermore, at the time Ordinance 91-95 was enacted, Bishop Estate alone owned the fee simple interest under approximately 12,500 of the leasehold condominium units. Bishop Estate Mem. Opp. filed 6/29/92, at 8.

[25] In *Reynolds*, the Supreme Court explained:

of calculating current fair market value and the appropriate factors to be considered are premature in this facial challenge at this point in time.[26] *Southern Pacific v. City of Los Angeles,* 922 F.2d 498, 505-07 (9th Cir.1990) (facial takings challenge alleging denial of just compensation is not ripe unless the plaintiff has sought compensation through the available procedures), *cert. denied,* ____ U.S. ____, 112 S.Ct. 382, 116 L.Ed.2d 333 (1991); *see also Richardson I,* 759 F.Supp. at 1481. The City Department of Housing and Community. Development has yet to enact the necessary rules to effectuate Ordinance 91-95. More importantly, the state courts have not had an opportunity to interpret and apply the compensation provisions of Ordinance 91-95. In sum, Ordinance 91-95 states that landowners shall be paid fair market value; accordingly, in the absence of evidence to the contrary, this court assumes that all factors necessary to comply with constitutional requirements will be considered.[27]

C. SUBSTANTIVE DUE PROCESS (COUNT VIII)

In order to prevail on its substantive due process claim, Bishop Estate must establish that Ordinance 91-95 is "arbitrary and irrational." *Del Monte Dunes v. City of Monterey,* 920 F.2d 1496, 1508 (9th Cir.1990). Bishop Estate claims that Ordinance 91-95 does not have a legitimate government purpose and that the ordinance is not rationally related to the alleged legislative purpose. The court finds no merit to Bishop Estate's substantive due process claim.

This court rejected these same type of arguments with respect to Bishop Estate's taking claim discussed above. The court further notes that a plaintiff has an extraordinarily high burden to carry in order to demonstrate that a legislative enactment is arbitrary and irrational under the due process clause. *See Del Monte Dunes,* 920 F.2d at 1508. Moreover, courts should give substantial deference to a legislature's determination of a public use or purpose as well as the legislative means for carrying out the purpose. *Midkiff,* 467 U.S. at 239-243, 104 S.Ct. at 2328-31. In *Midkiff,* the Supreme Court specifically recognized that the use of the government's eminent domain power to effect lease-to-fee conversion is a rational response to serious housing problems. *Id.* at 242-43, 104 S.Ct. at 2330-31. The Court in *Midkiff* stated that it found no merit to the plaintiffs' due

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> And "just compensation" means the full monetary equivalent of the property taken. The owner is to be put in the same position monetarily as he would have occupied if his property had not been taken. In enforcing the constitutional mandate, the Court at an early date adopted the concept of market value: *the owner is entitled to the fair market value of the property at the time of the taking.*
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> 397 U.S. at 16, 90 S.Ct. at 805 (footnotes omitted) (emphasis added).

[26] The court notes that Bishop Estate's argument regarding just compensation is distinct from the reasonable rate of return inquiry associated with Ordinance 91-96. With respect to Ordinance 91-96, the court had to determine whether a taking existed. One of the factors in determining whether a taking has occurred is whether the landowner will still be able to receive a fair rate of return on his property. In contrast, as Ordinance 91-95 involves complete condemnation, it necessarily involves a taking. Thus, the pertinent question is whether the landowner receives "just compensation" for the taking.

[27] The Ninth Circuit has held that a determination of "fair market value" may include severance damages. *United States v. 50.50 Acres of Land,* 931 F.2d 1349, 1358 (9th Cir.1991) ; see *generally Georgia-Pacific Corp. v. United States,* 226 Ct.Cl. 95, 640 F.2d 328 (1980).

process claim and it disposed of the matter in two sentences in a footnote. *Id.* at 243 n. 6, 104 S.Ct. at 2330 n. 6.

D. EQUAL PROTECTION (COUNT IX)

Generally, equal protection challenges are evaluated under rational-basis scrutiny to see whether the legislation at issue is irrational or wholly arbitrary. *Conti v. City of Fremont,* 919 F.2d 1385, 1389 (9th Cir.1990). Classifications based upon race, however, are presumptively invalid. *Personnel Adm'r of Mass. v. Feeney,* 442 U.S. 256, 272, 99 S.Ct, 2282, 2292, 60 L.Ed.2d 870 (1979). Nonetheless, the Supreme Court has made clear that "even if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose." *Feeney,* 442 U.S. at 272, 99 S.Ct. at 2292 (emphasis added) (citing *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), and *Arlington Heights v. Metropolitan Housing Dev. Corp.,* 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977)).

Thus, if the official action in question is race-neutral on its face, a plaintiff asserting an equal protection claim based upon race must prove the existence of racially discriminatory intent or purpose in order to prevail. *Arlington Heights,* 429 U.S. at 265, 97 S.Ct. at 563. The Supreme Court has cautioned that discriminatory intent or purpose requires more than simply intent as volition or awareness of consequences. *Feeney,* 442 U.S. at 279, 99 S.Ct. at 2296. A plaintiff must demonstrate that the legislation at issue was enacted "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable [racial] group." *Id.*; *see also Stop H-3 Ass'n v. Dole,* 870 F.2d 1419, 1431-32 (9th Cir.1989).

For the purposes of the present case, a brief examination of *Feeney* is instructive. In that case, female plaintiffs challenged a Massachusetts statute which gave veterans a preference for state civil service jobs. The plaintiffs alleged that the law violated their rights under the Fourteenth Amendment's Equal Protection Clause because the statute operated overwhelmingly to the advantage of men since over 98% of veterans were male.

Initially, the Supreme Court noted that the statute was gender-neutral on its face as it distinguished only between veterans and non-veterans, not men and women. 442 U.S. at 274, 99 S.Ct. at 2293. The Court reasoned that the law could not be rationally explained on the basis of gender:

> Veteran status is not uniquely male. Although few women benefit from the preference the nonveteran class is not substantially all female. To the contrary, significant numbers of nonveterans-male as well as female-are placed at a disadvantage. Too many men are affected by [the veterans preference law], to permit the inference that the statute is but a pretext for preferring men over women.

Id. at 275, 99 S.Ct. at 2294. In addition, the court noted that the statute's unfortunate impact upon women was easily explained, in a gender-neutral manner, by the legis.1a.ture's completely legitimate goal of aiding veterans. *Id.*

Furthermore, the Supreme Court in *Feeney* rejected the plaintiffs' allegations of gender-based discriminatory purpose. 442 U.S. at 276-80, 99 S.Ct. at 2294-97. Asserting that a person intends the natural and foreseeable consequences of his voluntary actions, the plaintiffs argued that the Massachusetts legislature must have intended to discriminate against women because the statute foreseeably and inevitably operated to the great disadvantage of women. *Id.* at 278, 99 S.Ct. at 2295. While the Court recognized the statute's foreseeable adverse consequences to women, the Court emphasized that there was no evidence that the preference for veterans was devised to harm women. *Id.* at 279, 99 S.Ct. at 2296. In essence, the purpose of the statute was clearly to help veterans, not to discriminate against women. *Id.* at 279-80, 99 S.Ct. at 2296-97.

In the present case, Bishop Estate argues that Ordinance 91-95 intentionally discriminates against Native Hawaiians. It contends that the discrimination is demonstrated in part by the fact that Bishop Estate and Liliuokalani Trust, two of the top five landowners affected by Ordinance 91-95, were created specifically for the benefit of Native Hawaiians.[28] Bishop Estate Mem.Opp. filed 6/29/92, at 7. However, Bishop Estate's equal protection arguments exhibit the same type of flaws as that of the plaintiffs' claims in *Feeney*.

Ordinance 91-95 is undoubtedly racially neutral on its face. Ordinance 91-95 applies to residential leasehold condominium lessors and lessees irrespective of the race or ethnic background of the affected parties. The impact of the ordinance is shared by all lessors, many of which, if not the majority, are not Native Hawaiian. Analogous to *Feeney,* too many non-Native Hawaiian lease fee owners are affected by Ordinance 91-95 to permit the inference that the statute is but a pretext for preferring non-Native Hawaiians over Native Hawaiians.

The present case is also similar to *Feeney* in that the plaintiffs have failed to establish any discriminatory intent or purpose. Like the legislators in *Feeney,* the drafters of Ordinance 91-95 were likely aware of the effect that the ordinance would have on entities, such as Bishop Estate, which are connected with Native Hawaiian ethnicity. However, in this case as well as *Feeney,* a perfectly legitimate government purpose explains the impetus of the legislation. Whereas *Feeney* involved aid to veterans, Ordinance 9195 was enacted in response to the critical problems in the Honolulu housing market, in particular leasehold condominiums. Thus, the court finds that the City has a legitimate public purpose for enacting Ordinance 91-95 and there is no credible evidence to support the notion that Ordinance 91-95 is but a pretext for discriminating against Native Hawaiians.

E. STATE CONSTITUTIONAL CLAIMS (COUNT XI)

In Count XI, Bishop Estate claims that Ordinance 9195 violates its rights under the takings, due process, and equal protection clauses of the Hawaii State Constitution. While the Hawaii State Constitution is generally modeled after the United States Constitution, the scope of its protections are not necessarily the same. *Hawaii*

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[28] More specifically, Bishop Estate argues that the alleged discriminatory purpose of Ordinance 91-95 against Native Hawaiians is evidenced by: disproportionate impact, history of public land policy, erroneous findings of fact, procedural irregularities in enacting the ordinance, the City's knowledge of the ordinance's impact, and the official action taken to enact the ordinance. Bishop Estate Mem.Opp. filed 6/29/92, at 5-30.

Housing Authority v. Lyman, 68 Haw. 55, 704 P.2d 888, 89,6 (1985). However, the legal analysis of Bishop Estate's claims under the aforementioned state constitutional provisions is essentially the same as the inquiry under the corresponding sections of the United States Constitution.[29] *See, e.g. id.* 704 P.2d at 897 (takings clause); State v. Cotton, 55 Haw. 148, 516 P.2d 715, 719 (1973) (due process clause); *Estate of Coates v. Pacific Eng'g*, 71 Haw. 358, 791 P.2d 1257, 1260 (1990) (equal protection clause). Accordingly, for the same reasons that this court rejected Bishop Estate's federal constitutional claims above, the court similarly finds its state constitutional arguments unpersuasive.

F. STATE STATUTORY CLAIMS (COUNT XIII)

In Count XIII, Bishop Estate contends that Ordinance 91-95 is preempted by various Hawaii state statutes. In particular, it claims that Ordinance 91-95 is preempted by the comprehensive provisions set forth in Hawaii Revised Statutes chapters 101 (eminent domain), 516 (residential leasehold condominiums and cooperatives), 519 (real property leases), 514A (condominiums), and 421H (cooperative housing corporations). For the reasons set forth below, the court certifies the preemption question to the Hawaii Supreme Court.[30]

The United States Supreme Court has consistently approved of the use of certified questions to state supreme courts when a federal court case involves an important question of state law which is both unclear under state legal precedent and would be determinative in the instant case. *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 393-98, 108 S.Ct. 636, 643-46, 98 L.Ed.2d 782 (1988); *Bellotti v. Baird*, 428 U.S. 132, 150-52, 96 S.Ct. 2857, 2867-68, 49 L.Ed.2d 844 (1976); *Lehman Bros. v. Schein*, 416 U.S. 386, 389-92, 94 S.Ct. 1741, 1743-45, 40 L.Ed.2d 215 (1974); *Clay v. Sun Ins. Office*, 363 U.S. 207, 212, 80 S.Ct. 1222, 1225, 4 L.Ed.2d 1170 (1960).[31] In *Lehman*, the Supreme Court explained:

> [Use of state certification procedures] does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism. Its use in a given case rests in the sound discretion of the federal court.

416 U.S. at 391, 94 S.Ct. at 1744 (footnote omitted).

While federal courts should not abdicate their duty to decide issues properly before them by routinely certifying questions to state supreme courts, certification under ap-

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[29] Moreover, the court notes that all of the parties have relied on the same arguments to support their positions on the state constitutional claims as they did with respect to the federal constitutional claims.

[30] The court need not certify the state law questions regarding Bishop Estate's claims under the Hawaii State Constitution because there is sufficient state law to enable this court to make an informed decision on these issues. Moreover, Rule 13(a) of the Hawaii Rules of Appellate Procedure permits certification only when there is no controlling precedent in the Hawaii judicial decisions.

[31] Most of the aforementioned cases as well as the succeeding cases regarding certification have extensive subsequent cases histories in light of the certified questions. As these cases are mentioned only as examples of certification and not for their substantive holdings, the court will omit the subsequent case histories

propriate circumstances can result in significant conservation of the litigants' time and money as well as judicial resources. The Ninth Circuit Court of Appeals has not hesitated to certify questions to state supreme courts when such questions involved important issues of unsettled state law which were controlling in the federal case.[32] District courts have similarly utilized the certification process. *See, e.g., Burdick v. Takushi,* 737 F.Supp. 582 (D.Haw.1990) (on remand following Ninth Circuit's reversal, district court certified three questions with respect to Hawaii election laws and write-in votes). The decision whether to certify a state law question to the state supreme court rests in the sound discretion of the federal district court. *Louie v. United States, 776* F.2d 819, 824 (9th Cir.1985).

In order for a federal court to be able to certify a question to a state supreme court, the state court must provide a specific procedure for receiving such questions. The Hawaii Supreme Court has authorized certified questions in Rule 13 of the Hawaii Rules of Appellate Procedure. Pursuant to Rule 13(a), a federal district court may certify a question to the Hawaii Supreme Court when such question (1) concerns Hawaii law which is (2) determinative of the cause and (3) there is no clear controlling precedent in the Hawaii judicial decisions.

In the present case, the court finds that Count XIII involves issues of state law which are determinative of the validity of Ordinance 91-95. The court further finds that the there is no clear controlling precedent in the Hawaii judicial decisions which disposes of these state law issues. In particular, this court finds conflicting authority as to whether Hawaii Revised Statutes chapter 101, which governs eminent domain procedures, preempts Ordinance 91-95.

On the other hand, the Hawaii legislature enacted the Land Reform Act which has eminent domain procedures nearly identical to those of Ordinance 91-95. Thus, the Hawaii legislature has specifically authorized certain types of eminent domain procedures which conflict with the general provisions of chapter 101. Furthermore, the State Attorney General has opined that Ordinance 91-95 is not preempted by state law.[33] On the other hand, relevant Hawaii statutory law seems to indicate that the City must utilize the eminent domain procedures in chapter 101 which appear to conflict with the procedures in Ordinance 91-95.

In addition the preemptory issues raised here implicate a broader question regarding the various county's authority to enact legislation in areas occupied, or at least partially occupied, by state law, While the Supreme Court of Hawaii has in the past addressed this question, as this case illustrates there remains significant room for interpretation and thus confusion. This question is of significant importance to both the counties

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[32]. See, e.g., Alaska Airlines v. United Airlines, 902 F.2d 1400, 1403-05 (9th Cir.1990); Morrell Constr. v. Home Ins. Co., 899 F.2d 875 (9th Cir-1990); Kunz v. Utah Power & Light Co., 871 F.2d 85, 87-88 (9th Cir.1989) ; Torres v. Goodyear Tire & Rubber Co., 867 F.2d 1234, 1237-39 (9th Cir.1989); Toner for Toner v. Lederle Labs., 779 F.2d 1429, 1432-34 (9th Cir.1986); Aetna Ins. Co. v. Craftwall of Idaho, 757 F.2d 1030, 1034 (9th Cir.1985); Meckert v. Transamerica Ins. Co., 742 F.2d 505, 506-07 (9th Cir.1984).

[33] *See* Opinion of the Attorney General of the State of Hawaii dated October 4, 1991, at 1. (Bishop Estate Mot. Partial Summ.J. filed 2/14/92, Ex. R). Nonetheless, the Attorney General did not specifically address the issue of preemption relating to chapter 101. To the contrary, the Attorney General seemed to, indicate that the City must utilize its eminent domain power pursuant to the procedures provided in chapter 101. Id. at 2.

and the state and transcends the boundaries of this case. Because this involves a pure question of state law and policy, in the final analysis it must be decided by the Hawaii Supreme Court.

This court is fully aware of the fact that certification in this case will cause some initial delay while the Hawaii Supreme Court addresses the certified question. Nonetheless, if this court were not to certify the state law preemption question, the court is confident that the Ninth Circuit Court of Appeals would itself order such certification in light of the controlling nature of the important, unsettled ,state law and policy issues. The court notes that the Ninth Circuit Court of Appeals has often certified questions to the Hawaii Supreme Court.[34]

Leaving the certification to the court of appeals would only cause further delay as well as undue confusion and uncertainty in the interim while the parties consider whether to act upon this court's decision on these purely state law issues in light of the pending appeal. Therefore, while certification will result in some initial delay, it will obviate a much greater delay and substantial confusion in the likely event the Ninth Circuit were to certify the preemption question while the case was on appeal.

Upon careful review of the relevant state law and the underlying state policy implications involved, the court finds that the purely state law preemption issue would be best answered in the first instance by the Hawaii Supreme Court. Accordingly, the court will certify this question to the Hawaii Supreme Court under Rule 13 of the Hawaii Rules of Appellate Procedure, and retain jurisdiction pending a determination by the Hawaii Supreme Court.

CONCLUSION

In *Richardson I*, this court held that Ordinance 91-96's predecessor statute, Ordinance 90-95, was unconstitutional for a number of reasons. Subsequent to that decision, the City, in enacting Ordinance 91-96, made an attempt to remedy the problems with Ordinance 90-95. While the City managed to correct some of the constitutional infirmities of Ordinance 90-95, it failed to appropriately address other defects. For the reasons stated above, the court GRANTS Bishop Estate's motion for partial summary judgment with respect to Ordinance 91-96 finding the ordinance unconstitutional for the reasons stated herein and DENIES the City's and the HALE Coalition's motions for partial summary Judgment regarding Ordinance 91-96.

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[34] *See, e.g., Smith v. Cutter Biological,* 911 F.2d 374 (9th Cir. 1990) (Ninth Circuit certified three questions regarding the Hawaii Blood Shield Law); *Graulty v. Bank of Hawaii,* 856 F.2d 78 (9th Cir.1988) (Ninth Circuit certified question pertaining to Hawaii Uniform Fiduciaries Act); *In re Asbestos Cases,* 829 F.2d 907 (9th Cir.1987) (Ninth Circuit certified question relating to Hawaii products liability law); *United States v. Allstate Ins. Co.,* 825 F.2d 243 (9th Cir.1987) (Ninth Circuit certified question regarding the government's ability to recover medical care costs under Hawaii law) ; *Kinoshita v. Canadian Pacific Airlines,* 803 F.2d 471 (9th Cir.1986) (Ninth Circuit certified question of Hawaii contract law) ; *Robinson v. Ariyoshi,* 753 F.2d 1468 (9th Cir.1985) (Ninth Circuit certified six questions regarding Hawaii water law issues).

With respect to Ordinance 91-95, this court has found the ordinance to be in compliance with the relevant provisions and standards of the United States Constitution and the Constitution of the State of Hawaii. Therefore, the court GRANTS the City's and HALE Coalition's motions for partial summary judgment with respect to the federal and state constitutional claims pertaining to Ordinance 91-95 finding the ordinance in compliance with federal and state constitutional standards and DENIES Bishop Estate's motion for partial summary judgment on those same claims.

The court also CERTIFIES to the Supreme Court of Hawaii the following question:

> According to Hawaii state law, is Ordinance 91-95 preempted by Hawaii Revised Statutes chapters 101, 516, 516D, 519, 514A, or 42 1 H?

The parties are ordered to submit the appropriate certificate in accordance with this court's separate order regarding certification.

IT IS SO ORDERED.

APPENDIX C

UNITED STATES DISTRICT COURT
D. HAWAII

Civ. No. 92-00372 HMF

SMALL LANDOWNERS OF OAHU,
a Hawaii nonprofit corporation,
Plaintiff,

V.

CITY AND COUNTY OF HONOLULU,
a Hawaii municipal corporation,
Defendant.

Sept. 16, 1993

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

FONG, District Judge.

INTRODUCTION

On August 30, 1993, the court heard oral argument on cross motions for summary judgment filed by Plaintiff Small Landowners of Oahu ("Small Landowners") and Defendant City and County of Honolulu (the "City").

The subject of this lawsuit is the constitutionality of Ordinance 91-95, a condominium lease-to-fee ordinance similar to the single family residence lease-to-fee statute upheld by the United States Supreme Court in *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984).

In a case brought by the Bishop Estate, Judge David Ezra of this court had previously held that Ordinance 91-95 was constitutional under both the United States and Hawaii constitutions. *Richardson, et a]., v. City and County of Honolulu (Richardson II),* 802 F.Supp. 326 _(D.Haw.1992), Exh. A to the City's Motion. Before a ruling on the summary judgment motions, Small Landowners unsuccessfully attempted to intervene in that case. *Richardson II,* Order of July 6, 1992, Exh. C to City's Motion.

BACKGROUND

Ordinance 91-95 was enacted on December 8, 1991.

In *Richardson II*, the court explained the operation of Ordinance 91-95 as follows:

> Ordinance 91-95 involves a mechanism for the transfer of the fee simple interest of leasehold property from condominium lessors to condominium lessees in Honolulu. In the "Findings and Purpose" section of Ordinance 91-95, the City found that there are approximately 16,000-17,000 residential condominium, cooperative and planned development units on leased land on Oahu.[1] Ord. 91-95 § 1. The City further found that the owners of such leased land had generally refused to sell proportionate shares in the land underlying such units. *Id.* As a result of this practice, the City determined that there exists "a serious shortage of fee simple residential condominium land, cooperative housing unit land and Planned development land and [ ] an artificial inflation of the value of such land on Oahu." *Id.*
>
> Accordingly, the City concluded that owners of condominiums on leased land should be able to acquire the proportionate share of leased land underlying their units at a fair and reasonable price. *Id.* In order to accomplish this objective, the City decided to use its eminent domain power to condemn the fee simple title to the land underlying condominiums, pay just compensation to the lessors/owners of such land, and sell the land to the condominium owners. *Id.*
>
> The City Department of Housing and Community Development ("Department") is charged with administering, enacting appropriate rules, and enforcing Ordinance 91-95. Ord. 91-95 §§ 1.7, 1.8. Article 2 of Ordinance 91-95 governs the condemnation of condominium development leaseholds.[2] The condemnation procedures are triggered once at least twenty-five of the condominium owners within the development or the owners of 50% of the condominium units, whichever is less, apply to the Department to purchase the leased fee interest. *Id.* § 2.2 (a) (1). After such an application, the

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[1] For the sake of simplicity, the court will refer to all condominium apartments, cooperative housing units, and planned development units covered by Ordinance 91-95 as "condominiums," unless otherwise indicated. While the court recognizes the legal distinctions between these forms of apartment ownership, such distinctions are not relevant to the issues at hand.

[2] Articles 3 and 4 contain similar provisions relating to cooperative housing development leaseholds and residential planned development leaseholds, respectively.

> Department must publish notice and hold a public hearing to determine whether the acquisition of the leased fee interest will effectuate the public purposes of the ordinance. *Id.* § 2.2 (a) (2).
>
> Within twelve months after the Department has designated a condominium development, or portion thereof, for acquisition, the Department must institute eminent domain proceedings unless the parties voluntarily agree to a sale of the property. Ord. 91-95 § 5.2. The compensation to be paid for the acquired property shall be the fair market value of the leased fee interest determined as of the date of the summons of the complaint in the eminent domain proceeding. *Id.* § 5.3.
>
> After the City has acquired the subject land, authorized condominium lessees must purchase the underlying land within sixty days of acquisition. *Id.* § 2.3. In order to be eligible to buy the leased land, a purchaser must satisfy a list of seven requirements. *Id.* § 2.4.

Richardson II Summary Judgment Order at 29-32, City's Exh. C.

SUMMARY JUDGMENT STANDARD

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment shall be entered when:

> ... the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The moving party has the initial burden of "identifying for the court those portions of the materials on Me that it believes demonstrate the absence of any genuine issue of material fact." *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n,* 809 F.2d 626, 630 (9th Cir.1987) (citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548P 2553, 91 L.Ed.2d 265 (1986)). The movant need not advance affidavits or similar materials to negate the existence of an issue on which the opposing party will bear the burden of proof at trial. *Celotex,* 477 U.S. at 323, 106 S.Ct. at 2553.

If the moving party meets its burden, then the opposing party must come forward with "specific facts showing that there is a genuine issue for trial" in order to defeat the motion. Fed.R.Civ.P. 56(e); *T.W. Elec.,* 809 F.2d at 630. The opposing party cannot stand on the pleadings nor simply assert that it will discredit the movant's evidence at trial. *Id.* "If the factual context makes the [opposing] party's claim *implausible,* that party must come forward with more persuasive evidence than would otherwise be necessary to show

that there is a genuine issue for trial." Cal. *Arch. Bldg. Prods. v. Franciscan Ceramics,* 818 F.2d 1466, 1468 (9th Cir.1987) (citing *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986)).

The standard for summary judgment reflects the standard governing a directed verdict. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250, 106 S.Ct. 2505, 2512, 91 L.Ed.2d 202 (1986)). When there is a genuine issue of material fact, "the judge must assume the truth of the evidence set forth by the [opposing] party with respect to that fact." *T.W. Elec.,* 809 F.2d at 631. Inferences from the facts must be drawn in the light most favorable to the non-moving party. *Id.*

DISCUSSION

I. PRECLUSIVE EFFECT OF RICHARDSON II

The City argues that the decision in *Richardson II* precludes Small Landowners from relitigating the constitutionality of Ordinance 91-95. The City advances res jud.1cata (claim preclusion), collateral estoppel (issue preclusion), and judicial estoppel as the sources of the preclusion.

Res judicata or claim preclusion provides that a final judgment, "when rendered on the merits. is an absolute bar to a subsequent action between the same parties or those in privity with them, upon the same claim or demand." *IB Moore's Federal Practice* ¶ 0.405[1] at p. III-4.

The City concedes that Small Landowners was not a party to the earlier suit, but argues that Small Landowners was in privity with the plaintiffs in *Richardson II.* "Privity" is more a conclusion based on the individual facts than a rigorous test. 18 Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure* § *4449* (1981). The predominant factor in determining privity is the connection between the two parties. 'let. While both the *Richardson II* plaintiffs and Small Landowners are owners of condominiums affected by the statute, there is no other link shown. Thus, they are not in privity. Res judicata does not preclude Small Landowners.

The City argues in the alternative that collateral estoppel or issue preclusion bars relitigation of the issues decided in *Richardson II.* The doctrine of nonmutual collateral estoppel sometimes gives preclusive effect to earlier judgments obtained in litigation against others. *See Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation,* 402 U.S. 313, 91 S.Ct. 1434, 28 L.Ed.2d 788 (1971); *Green v. Ancora-Citronelle Corp.,* 577 F.2d 1380, 1384 & n. 2 (9th Cir.1978). The most important limitation on nonmutual preclusion is that the party precluded had a "full and fair opportunity to litigate in the prior action." 18 Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure* § 4465 (1981).

Small Landowners did not have a full and fair opportunity to litigate in *Richardson II.* It would be unfair to bind them to a result that they were denied an opportunity to influence through their own arguments. Furthermore, if the City wanted to bind Small Landowners by the decision in *Richardson II,* it could have and should have

joined Small Landowners as a party to that litigation. *Martin v. Wilks*, 490 U.S. 755, 109 S.Ct. 2180, 104 L.Ed.2d 835 (1989). Thus, Small Landowners is not collaterally estopped by *Richardson II*.

Finally, the City argues that principles of "judicial estoppel" preclude Small Landowners from relitigating the constitutionality of Ordinance 91-95.

Judicial estoppel does not apply here. The doctrine of judicial estoppel prevents a party from asserting a position that is inconsistent with an earlier position taken in the litigation. *Yanez v. United States*, 989 F.2d 323 (9th Cir.1993). Here, Small Landowners has not asserted any inconsistent earlier positions.

II. CONSTITUTIONAL CHALLENGES TO ORDINANCE 91-95

Both sides have moved for summary judgment on Small Landowners' claims that Ordinance 91-95 effects an impermissible taking, that it violates substantive due process, and that it violates the Equal Protection Clause.

A. TAKINGS CLAUSE (COUNT 1, VII, XIV)

Count VII of the complaint alleges that Ordinance 9195 effects an impermissible taking in violation of the Fifth Amendment to the United States Constitution. Count XIV alleges a violation of the Takings Clause of the Hawaii State Constitution. Count I alleges that the taking was a deprivation of constitutional rights actionable under 42 U.S.C. § 1983.

The Takings Clause of the Fifth Amendment to the United States Constitution states that "private property [shall not] be taken for public use, without just compensation." The Takings Clause applies to the states through the Fourteenth Amendment. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 244 n. 7, 104 S.Ct. 2321, 2331 n. 7, 81 L.Ed.2d 186 (1984). Moreover, a state may delegate its power to condemn to a municipality. *Cf. Jacobson v. Tahoe Regional Planning Agency*, 566 F.2d 1353 (9th Cir.1977), *aff'd in part and rev'd in part on other grounds*, 440 U.S. 391, 99 S.Ct. 1171, 59 L.Ed.2d 401 (1979).

In *Midkiff*, the United States Supreme Court upheld Hawaii's Land Reform Act of 1967. That statute provided for condemnation of the fee simple interest of the land under leasehold single family residences. The Hawaii legislature had passed the Land Reform Act in an effort to correct a land oligopoly.

The Supreme Court found that the Land Reform Act's approach to correcting the land oligopoly problem was not irrational. *Id.* The Court elaborated:

> [The Land Reform Act,] like any other, may not be successful in achieving its intended goals. But "whether *in fact* the provision will accomplish its objectives is not the question: the [constitutional requirement] is satisfied if ... the ... [state] Legislature *rationally could have believed* that the [Act] would promote its objective." When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings, no less than debates over the wisdom of other kinds of socioeconomic

> legislation are not to be carried out in the federal courts. Re-distribution of fees simple to correct deficiencies in the market determined by the state legislature to be attributable to land oligopoly is a rational exercise of the eminent domain power. Therefore, the Hawaii statute must pass the scrutiny of the Public Use Clause.

467 U.S. at 242-43, 104 S.Ct. at 2330.

The Takings Clause analysis under the Hawaii Constitution is similar. Article I, section 20 of the Hawaii Constitution reads, "[private property shall not be taken or damaged for public use without just compensation." In *Hawaii Housing Authority v. Lyman,* 68 Haw. 55, 704 P.2d 888 (1985), the Hawaii Supreme Court adopted a very deferential position similar to that in *Midkiff*:

> We therefore hold that once the legislature has spoken on the social issue involved, so long as the exercise of the eminent domain power is rationally related to the objective sought, the legislative public use declaration should be upheld unless it is palpably without reasonable foundation. The crucial inquiry is whether the legislature might reasonably consider the use public, and whether it rationally could have believed that application of the sovereign's condemnation powers would accomplish the public use goal.

Id. at 70-71, 704 P.2d 888.

The court now turns to the specific arguments advanced by Small Landowners.

1. The City Council's Findings

Small Landowners first argues that the City Council's findings are unsupported by the record. Specifically, Small Landowners asserts that there is no oligopoly in condominium ownership, that there is no shortage of fee simple condominiums, and that many lessees are financially better off than lessors.

Small Landowners has a difficult burden in attacking the City Council's findings of fact. The court must give deference to a legislative body's factual findings. A party challenging a factual finding made by a legislative body must show that "the legislative facts [relied upon] could not reasonably be conceived to be true by the governmental decisionmaker." *Vance v. Bradley, 440* U.S. 93, 110-11, 99 S.Ct. 939, 949-50, 59 L.Ed.2d 171 (1979); *Lamb v. Scripps College,* 627 F.2d 1015 (9th Cir.1980).

Small Landowners suggests that the court should not defer to the factual findings of the City Council because it is a municipality rather than a state legislature. Although Small Landowners correctly notes that municipalities and states are treated differently in the Eleventh Amendment immunity context, Small Landowners does not cite any case authority supporting its suggested distinction in this area.

The distinction is unwarranted because the deference given to legislative findings reflects a concern with the separation of powers between the legislature and the judiciary. It is as offensive to disturb the findings of city legis1ators as it is to disturb the findings of state legislators.

Moreover, despite the law review articles cited by Small Landowners, property owners are not "discrete and insular minorities" who deserve special judicial protection because they lack access to the political system. *United States v. Carolene Products Co.*, 304 U.S. 144, 58 S.Ct. 778, 82 L.Ed 1234 (1938). The absurdity of this suggestion is shown by the fact that the Bishop Estate is one of the institutions challenging this statute. The power of the Bishop Estate in Hawaii belies any claim that it lacks access to the political system.

Small Landowners suggests that the Supreme Court's decision in *Lucas v. South Carolina Coastal Council* signals reduced deference to legislative findings. ____ U.S. ____, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). The *Lucas* Court rejected the South Carolina legislature's finding that construction on plaintiff's beach front property could be curtailed because it threatened serious public harm. In order to avoid compensating plaintiff for a regulatory taking, the Court held, the legislature would need to find that common law principles such as nuisance allowed the prohibition of the construction. *Id.* ____ U.S. at ____, ____, 112 S.Ct. at 2901-02.

Lucas does not mean that all legislative findings are suspect. Rather, it is distinguishable because the South Carolina legislature had a vested interest in finding that the plaintiff's use of his property caused harm. If the legislature determined that the use was harmful, it could restrict that use without paying compensation to the plaintiff. Thus, the legislature's finding of harm was inherently suspect. There is no reason to extend this heightened scrutiny to physical Takings cases in which the legislature has already committed itself to paying compensation.

Thus, the court will give great deference to the City Council's findings. The City Council need not consider the best evidence. Rather, it must simply have some evidence that could convince a rational legislator of the truth of the findings.

Applying this standard, the court finds adequate support for the City Council's findings.[3] For example, the City Council found that the leasehold condominium system allowed lessors to renegotiate large lease rent increases. This is supported by the statements of many persons who testified before the City Council.[4] Similarly, the testimony supported the City Council's findings that some lessees could not buy the fee simple interest without a

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[3] The court does not need to examine every finding. The findings that are supported provide an adequate basis for the Council to have passed the ordinance.

[4] *See, e.g.*, statements of Theresa Miyamoto, CX00019; Helen Higgins, ("I live at the Sandalwood, the apartment that was raised from affordable living to unaffordable right now.") CX00020; Darvin Haupert (lease rent increased by 8000 percent), CX00026-27; Knud Lindgard, CS00220; Richard Rosen, CX00252. All numbers refer to Bate stamp numbers given in Small Landowners' Exhibit 1.

mandatory conversion program,[5] and that lessees were forced to surrender their improvements on the land.[6]

Small Landowners most vigorously attacks the City Council's finding that land ownership is concentrated in the hands of owners who have refused to sell their fee simple interests. Citing statistics, Small Landowners argues that the fee simple interests are spread among many owners and that there is no concentration of ownership.[7] Thus, Small Landowners contends, there is no oligopoly that would support the passage of the ordinance as in *Midkiff*.

Small Landowners' argument is fruitless. First, the City Council's finding is not that there is an oligopoly, but rather that ownership is concentrated among landowners who have refused to sell. That finding almost proves itself because landowners who have agreed to sell are no longer owners. Moreover, the fact that landowners have refused to sell is supported by the statements cited above. Thus, the City Council's finding has adequate support.

Second, even if the finding was unsupported, it would not invalidate the ordinance. The City Council made several adequately supported findings upon which it could rationally decide to exercise its eminent domain power. Small Landowners has not succeeded in invalidating those findings.

2. The Use of Mandatory Conversion

Small Landowners argues that even if the findings are accepted, the mandatory conversion is irrational because it cannot correct these problems. Small Landowners supports its argument by noting that single-family residence prices rose after the mandatory conversion program went into effect. Thus, Small Landowners suggests, a rational legislator could not believe that condominium prices would fall.

The City Council's choice need not be a wise one, it must merely be rational. Ordinance 91-95 passes this minimal test. Transferring the fee simple title to the lessees will end the problem of gouging lessees on lease rent negotiations. The ordinance will force sales by unwilling lessors. Furthermore, it will allow lessees to keep the value of their improvements on the land. The means chosen by the City Council is a rational one.

3. Public Use Without Public Funds

Small Landowners further argues that there is no taking "for public.. use" because private funds are used in the conversion.

This argument was flatly rejected in *Midkiff*. There, the Supreme Court upheld the legislature's finding of public use despite the fact that private funds were used to buy the fee simple interests. *Midkiff*, 467 U.S. at 241, 104 S.Ct. at 2329. The question is not the

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[5] *See* Small Landowners Exhibit 1, testimony of Steve Holmes, CX00251; Edward Jurkens, CX00285; Jerome Manis, CX00283.

[6] *See*, Small Landowners Exhibit 1, Knud Lindgard, CX00220; Darvin Haupert, CX00215.

[7] *See* Ezra, O'Connor, Moon & Tam Report, Exhibit 4 to Small Landowners' Motion, at 47 (415 of 466 landowners (89%) own land under only one condominium project).

source of the funds, but rather whether the legislature rationally believed that the taking served a public purpose. *Id.*

The City Council reasonably believed that its eminent domain could solve the numerous problems that it found to have been caused by the condominium lease system. Thus, its decision to exercise its power comports with the constitution.

4. Taking of a Cotenancy

Small Landowners argues that the City may not condemn only a portion of the land, leaving the building's owner in a forced cotenancy with the former lessees. Small Landowners cites the following sentence from *Hendler v. United States, 952* F.2d 1364, 1374 (Fed.Cir.1991): "The Government does not have the right to declare itself a co-tenant-in-possession with a property owner."

The citation is taken completely out of context, and does not affect the result here. In *Hendler,* the district court had held that no taking occurred when the statute allowed EPA inspectors to enter the land and conduct monitoring. The appellate court reversed, holding that the government's entry onto land was a taking of the right to sole possession, and was therefore compensable. *Id.* at 1374. The *Hendler* court did not hold, as Small Landowners suggests, that the government can never take a portion of a property and leave the rest. The government's ability to take only a limited interest in property has been repeatedly affirmed. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982) (government must pay for taking of land necessary for a roof top cable).

5. Inadequate Compensation

Small Landowners asserts that Ordinance 91-95 under-compensates the present owners for the value of the taken fee simple interests. This claim is unripe because the procedures challenged have never been used. *Southern Pacific v. City of Los Angeles,* 922 F.2d 498, 505-07 (9th Cir. 1990) (facial takings challenge alleging denial of just compensation is not ripe unless the plaintiff has sought compensation through the available procedures), *cert. denied,* ____ U.S. ____, 112 S.Ct. 382, 116 L.Ed.2d 333 (1991).

6. Generalized Claims of Unfairness

Small Landowners makes several generalized claims of unfairness as well.

Small Landowners argues that the City's tax policies forced landowners to develop condominiums which Will be taken away by Ordinance 91-95. Even if this seems harsh to the landowners, it is not a basis to invalidate Ordinance 91-95. Tax policy can create social problems that a city may attempt to solve by rational means. Ordinance 91-95 is a rational attempt to solve the ills that the City Council found, whatever their source.

Small Landowners notes that all five of the City Council members who voted for Ordinance 91-95 have interests in leasehold condominiums. This is not a basis to invalidate the statute. If it were, the City Council could never pass any statute dealing with condominiums. Disclosure of their interests allows the public to correct any problem through the political process.

B. SUBSTANTIVE DUE PROCESS (COUNTS VIII AND XV)

Counts VIII and XV allege that Ordinance 91-95 violates Small Landowners' substantive due process rights under the Fourteenth Amendment to the United States Constitution and Article 1, section 5 of the Hawaii Constitution.

In order to prevail on these claims, Small Landowners must establish that Ordinance 91-95 is "arbitrary and irrational." *Del Monte Dunes v. City of Monterey,* 920 F.2d 1496, 1508 (9th Cir.1990); *State v. Cotton,* 55 Haw. 148, 153, 516 P.2d 715 (1973). As explained above, Small Landowners does not meet this burden because the ordinance is a rational exercise of legislative power.

C. EQUAL PROTECTION (COUNTS IX, XVI)

Counts IX and XVI allege that Ordinance 91-95 violates Small Landowners' equal protection rights guaranteed by the Fourteenth Amendment to the United States Constitution and Article 1, section 5 of the Hawaii Constitution. Small Landowners argues the ordinance irrationally groups small landowners with owners such as Bishop Estate who own many projects.

Legislative classifications not involving a suspect class must be rationally related to furthering a legitimate state interest. *Massachusetts Board of Retirement v. Murgia,* 427 U.S. 307, 312, 96 S.Ct. 2562, 2566, 49 L.Ed.2d 520 (1976); *Estate of Coates v. Pacific Engineering,* 71 Haw. 358, 363, 791 P.2d 1257 (1990). Here, the City Council found that the refusal of both large and small landowners to sell their land created economic problems. Thus, the City Council rationally decided to treat the problem by subjecting both large and small landowners to mandatory conversion. There is no constitutional problem with this approach.

Small Landowners misplaces two other arguments under the equal protection banner. First, it asserts that Ordinance 91-95 violates equal protection because landowners who are forced to sell their properties will have a difficult time avoiding taxes by replacing them with tax free "like kind" properties. This is definitely a disadvantage to those forced to sell, but it is not an equal protection violation.

Second, Small Landowners again asserts the unfairness of forcing land owners into a cotenancy with their former lessees. Again, this does not show the use of an irrational classification, so it is not a violation of the Equal Protection Clause.

In summary, the court holds that Ordinance 91-95 is constitutional under both the federal and state constitutions. Accordingly, the court DENIES Small Landowners' motion for summary judgment, and GRANTS the City's motion for summary judgment on Counts I, VII, VIII, IX, XIV, XV, and XVI of the complaint.

III. COMPLIANCE WITH THE CITY CHARTER (COUNT XXII)

The City moves for summary judgment on Count XXII which alleges that Ordinance 91-95 conflicts with procedural requirements of Section 3-110 of the City Charter. Section 3-110 requires that the City Council, prior to taking property under its

eminent domain power, shall adopt a resolution declaring the necessity of the taking as well as other information regarding the property.

This issue is not ripe for a facial challenge to the statute. When the City actually condemns property, it will presumably be required to comply with the Charter. That question should be reserved for another day. Accordingly, the court GRANTS the City's motion for summary judgment on Count XXII.

CONCLUSION

In summary, this case is indistinguishable from *Midkiff,* and the lenient standards set there compel a conclusion that Ordinance 91-95 is a rational and constitutionally permissible exercise of the eminent domain power.

IT IS SO ORDERED.

APPENDIX D

ORDINANCE NO. 91-95

BILL NO. 156 (1990)
CD-1, FD-1

A BILL FOR AN ORDINANCE RELATING TO RESIDENTIAL CONDOMINIUM AND COOPERATIVE LEASEHOLD CONVERSION FOR REAL PROPERTY SITUATED IN THE CITY AND COUNTY OF HONOLULU.

BE IT ORDAINED by the People of the City and County of Honolulu:

SECTION 1. Findings and Purpose.

The Council finds that:

(a) The historical pattern of landownership on Oahu has led to the practice of landowners leasing rather than selling their land. Ownership of land beneath residential condominium apartments, cooperative housing units and residential planned developments on Oahu is consistent with this pattern and is concentrated in the hands of the owners of such land who have refused to sell proportionate shares in their fee simple titles to such land to the lessees residing in residential condominium apartments, cooperative housing units and planned developments situated on such land and who have instead engaged in the practice of leasing such proportionate shares of their lands to such lessees under long-term leases.

Runaway land prices, especially in the last three years, have put housing costs well beyond the means of a large segment of the population. These prices are driving up new leasehold ground rents (lease rents) that in large measure are based upon present fee values.

Under the terms of most residential leases, the renegotiated lease rent amount is typically based on land values existing at the time of renegotiation. As a result, the acute recent inflation of land costs has adversely affected lease rent negotiations of persons who have purchased leasehold multi-family units as their homes: in some instances renegotiations have resulted in lease rents that have increased over 1,000 percent. Under the burden of increased lease rents, many owner-occupants of residential condominium apartments, cooperative housing units and planned development units, especially those on fixed incomes, have found, and will continue to find themselves unable to afford. to continue living in their homes. If they are displaced from these homes, these owner-occupant lessees could be displaced entirely from the ranks of home-owners because of Oahu's continuing housing crisis. Therefore, there is a desire by many lessees to convert to fee ownership. At the present time, there are approximately 16,000-17,000 residential condominium, cooperative and planned development units on leased land on Oahu.

The refusal of such landowners to sell proportionate shares in their fee simple titles to their lands to such lessees and cooperative owners and the pervasiveness of such practice of leasing rather than selling such shares in the land has resulted in a serious shortage of fee simple residential condominium land, cooperative housing unit land and planned development land and in an artificial inflation of the value of such land on Oahu.

Due to such shortage of fee simple residential condominium, cooperative and planned development land and such artificial inflation of such land values, many people on Oahu have been deprived of a choice to own an interest in or take a lease of the land on which their residential condominium, cooperative and planned development homes are situated and have been required instead to pay exorbitant leased fee purchase prices for a proportionate fee simple ownership share in such land. These lessees have been forced to accept long-term leases or renewed leases of such land which contain terms and conditions that are financially disadvantageous to them, that restrict their freedom to fully enjoy such land and that are weighted heavily in favor of the landowners; or to surrender title to and possession of their residential condominium, cooperative and planned development homes at the expiration of their current leases.

The acquisition by people, who are lessees and owners of condominium apartments, cooperative housing units and planned development units, of proportionate shares of the land on which their homes are situated in fee simple, at fair and reasonable prices and the ability of such lessees and owners to fully enjoy such land through proportionate ownership of such land in fee simple will alleviate these conditions and will promote the economy of Oahu and public interest, health, welfare, security and happiness of such lessees and owners.

There is a close relationship between the monetary values accorded land on Oahu and the stability and strength of Oahu's economy as a whole. Residential condominium, cooperative housing and planned development land values, artificially inflated by concentrated or single ownership, market conditions or other factors, skew Oahu's economy toward unnecessarily high levels. The pervasive and substantial contribution made to inflation by high residential condominium, cooperative housing and planned development land values creates a potential for economic instability and disruption on Oahu. Economic inflation, instability and disruptions on Oahu have real and potential damaging consequences for all members of an affected society. Checking inflation, improving the stability of the economy, and avoiding disadvantageous economic disruptions all are productive of general benefit to all members of Oahu's community.

The sound and wise conservation, preservation, use and management of residential condominium, cooperative housing and planned development land cannot be separated from the subject of patterns of residential condominium, cooperative and planned development land ownership. To accomplish the public purpose of wisely conserving, preserving, using, and managing residential condominium, cooperative housing and planned development land on Oahu requires changing present patterns of residential condominium, cooperative housing and residential planned development land ownership. Changing present patterns of such land ownership on Oahu by allowing residential

condominium lessees, cooperative housing unit owners and planned development housing owners under leases of such land to purchase in fee simple, a proportionate share of such land on which their homes are situated through the exercise of the City's power of eminent domain to acquire such fee simple interest to such land and public financing of such purchase and such condemnation and payment through the issuance of bonds, the expenditure of general revenue funds and the use of private funds which are at the disposal of the City, will help to satisfy the pressing public necessity for a secure, strong and stable Oahu economy.

The use of the City's eminent domain power to condemn the fee simple title to residential condominium, cooperative housing units and residential planned development land and the payment of just compensation therefor for the purpose of making proportionate shares of the fee simple title thereto and the use thereof available for acquisition by people who are condominium lessees, cooperative housing unit owners and owners of planned development units under leases of such land on which their homes are situated, or who face imminent expiration of such leases and the potential surrender, altogether, of title to and possession of their residential condominium apartments, cooperative housing units and planned development units in accordance with such leases is for a public use and purpose.

The power of the City to use eminent domain to effectuate the purposes and objectives of this Bill is granted to the City under Sections 46-1.5(6), (13) and (16) and Chapter 101, Hawaii Revised Statutes.

(b) It is therefore declared to be necessary and it is the purpose of this Ordinance to alleviate the conditions found in subsection (a) of this ordinance by providing for the right of any person who is a lessee or owner under a long-term lease of residential condominium, cooperative housing unit or residential planned development land on Oahu to purchase at a fair and reasonable price a proportionate share of the fee simple title to such land, by providing for the condemnation of the fee simple title to such land and the payment of just compensation therefor by the City through the use of its eminent domain power and by providing for the public financing of such purchase and such condemnation and payment through the issuance of bonds, the expenditure of general revenue funds and the use of private funds which are at the disposal of the City.

SECTION 2. The Revised Ordinances of Honolulu is amended by adding a new chapter to be appropriately designated and to read as follows:

CHAPTER ____

RESIDENTIAL CONDOMINIUM, COOPERATIVE HOUSING AND RESIDENTIAL PLANNED DEVELOPMENT LEASEHOLD CONVERSION

ARTICLE 1. GENERAL PROVISIONS.

Sec. ___-1.1. Purpose. The purpose of this Chapter is to establish the right of any person, who is a lessee under any long-term lease of land upon which are situated either

residential condominium property regime projects created under Chapter 514A, Hawaii Revised Statutes, cooperative housing unit projects or residential planned development projects, to purchase at a fair and reasonable price the fee simple title to such land.

Sec. ___ -1.2. Definitions. Unless otherwise clear from the context, as used in this Chapter:

"Association of apartment owners" has the same meaning as in Section 514A-3, Hawaii Revised Statutes.

"City" means the City and County of Honolulu.

"Condominium" means a residential apartment, together with an appurtenant undivided interest in common elements, located on land subject to a declaration of condominium property regime as defined in Chapter 514A, Hawaii Revised Statutes, together with an appurtenant undivided interest in common elements, both used or occupied, or developed, devoted, intended, or permitted to be used or occupied as a principal place of residence for a single family.

"Condominium property regime" means a condominium property regime project established under Chapter 514A, Hawaii Revised Statutes.

"Cooperative" means a residential apartment in a housing project held, owned, or leased by a cooperative housing corporation.

"Cooperative owner" means the owner of a cooperative.

"Cooperative housing corporation" means a corporation which satisfies the requirements of Section 519-3(d)(1), Hawaii Revised Statutes, or of Chapter 421H, Hawaii Revised Statutes, and the requirements of section 216 of the Internal Revenue Code of 1986, as amended.

"Department" means the City department of housing and community development created by Article 6, Chapter 10, Revised Charter of the City and County of Honolulu 1973, as amended.

"Development" means an area of land, irrespective of size, which:

(1) Is subject to a declaration of condominium property regime pursuant to Chapter 514A, Hawaii Revised Statutes, which condominium property regime contains or is intended to contain condominium apartment units occupied or to be occupied under apartment leases or condominium conveyance documents; or

(2) Contains or is intended to contain a cooperative housing unit project held, owned or leased by a cooperative housing corporation.

(3) Contains or is intended to contain a residential planned unit development project;

To qualify as a development, there shall be 10 or more residential condominium apartment units, cooperative housing apartment units or residential planned development housing units on the land.

"Director" means the director of the department of housing and community development.

"Fair market value" means that amount of money that a purchaser willing, but not obliged, to buy land or an interest in land would pay to an owner willing, but not obliged, to sell the land or interest in land in an open market, taking into consideration all uses to which the land is adapted or might in reason be applied.

"Fee owner" means the person who owns the fee simple title to the land leased under an apartment lease, condominium conveyance document, or proprietary lease, including a life tenant with a remainder over, vested or contingent, and a holder of a defeasible estate, and the person's heirs, --successors; -legal representatives, and assigns.

"Lease" means the conveyance of land or an interest in land by a fee simple owner as lessor, to a lessee or sublessee, or by any other person as sublessor to any person, in consideration of payment of rent or other recompense. With respect to a cooperative, lease means a ground lease to the cooperative housing corporation and not leases to the individual apartment unit owners.

"Leased fee" and "leased fee interest" mean reversionary interests of the fee owner, lessor, and all legal and equitable owners of land which is leased, other than the lessee's or sublessee's interest.

"Legal and equitable owners" means the fee simple owner and all persons having legal or equitable ownership interests in the leased fee or in the lessor's leasehold estate, including mortgagees, developers, lienors, and sublessors, and their respective heirs, successors, legal representatives, and assigns.

"Lessee" means any person to whom land is leased or subleased, including the person's heirs, successors, legal representatives, and assigns and who is the owner-occupant of the residential condominium unit, residential cooperative housing unit or residential planned development unit.

"Lessor" means any person who leases or subleases land to another, and the person's heirs, successors, legal representatives and assigns.

"Person" means any person who leases or subleases land from a lessor and, for purposes of this chapter, means the same as the term "lessee" as used in this chapter.

"Planned development" means a housing development project, also known as a cluster housing development or planned unit development, where the apartment owner holds a leasehold interest in the lot under his or her unit, and provided that this interpretation excludes any planned unit development covered by Chapter 516, Hawaii Revised Statutes.

The terms "lessors," "lessees," "fee owner," and "legal and equitable owners" include individuals, both masculine and feminine, and the terms also include corporations, firms, associations, trusts, estates, and the state and the City and County of Honolulu. When more than one person are the lessors, lessees, fee simple owners, fee owners, or legal and equitable owners of a lot, the terms apply to each of them, jointly and severally.

The term "owner-occupant" means any individual in whose name sole or joint legal title is held in a residential condominium unit, residential cooperative apartment unit or residential planned development unit which, simultaneous to the individual's ownership, serves as the individual's principal place of residence for a period of not less than one year immediately prior to application for conversion, as well as during the period pending legal proceedings to acquire the fee; provided that the individual shall retain complete possessory control of the premises of the residential unit during these periods. An individual shall not be deemed to have complete possessory control of the premises if the individual rents, leases, or assigns the premises for any period of time to any other person in whose name legal title is not held. Proof of residency and possessory control shall be as established by rules adopted by the Department.

The term "owner-occupant-shareholder" means any individual who is a sole or joint legal owner of shares in a cooperative housing corporation or trust and leases a cooperative apartment unit which, simultaneous to the individual being a shareholder, serves as the individual's principal place of residence for a period of not less than one year immediately prior to application for conversion, as well as during the period pending legal proceedings to acquire the fee; provided that the individual shall retain complete possessory control of the premises of the unit during these periods. An individual shall not be deemed to have complete possessory control of the premises of the unit if the individual rents, leases, or assigns the premises for any period of time to any other person who is not a shareholder and does not have a proprietary lease to the cooperative apartment unit. Proof of residency and possessory control shall be as established by rules adopted by the Department.

For purposes of this Chapter, the terms "residential condominium apartment," "residential condominium housing unit," "residential cooperative housing unit," "residential cooperative apartment unit," or "residential planned development unit," shall not include the following:

(1) A unit used for commercial purposes;

(2) A unit used as a time share unit or transient vacation unit as defined under Chapter 21A, article 9; or

(3) Any other nonresidential condominium, cooperative, or planned development unit.

Sec. ___-1.3. Applicability. This Chapter applies to all lands, in the City and County of Honolulu on which are situated either residential condominium property regime projects created under Chapter 514A, Hawaii Revised Statutes, cooperative housing units projects or residential planned development projects owned or held privately or by the City and County of Honolulu or by the State, except Hawaiian home lands subject to Article XII of the Constitution of the State and lands owned or held by the federal government. This Chapter is not meant to supersede or preclude any other remedy at law available to condominium apartment owners, cooperative housing corporations or owners of residential planned development units, including those available under Chapter 480, Hawaii Revised Statutes.

Sec. ___ -1.4. No Estoppel or Waiver. The rights granted to lessees by this Chapter shall be effective, notwithstanding any provision in any lease, contract, covenant, bylaw, or articles of incorporation to the contrary. No lessee shall be estopped by any covenant, term, condition, or contract, however worded, from claiming the rights granted by this Chapter, or otherwise be deemed to have waived those rights. Any provision in any lease, covenant, contract, bylaw or article of incorporation contrary to the intent or purpose of this Chapter shall be void.

Sec. ___-1.5. Trusts and Estates. The rights granted to lessees by this Chapter shall be effective, notwithstanding any condition or provision to the contrary in any instrument creating any life tenancy, defeasible fee, estate, or trust, regardless of whether the tenancy, fee, estate, or trust was in effect prior to the effective date of this Chapter or is created hereafter; and the life tenant, holder, officer, or trustee of any tenancy, defeasible fee, estate, or trust may convey residential leases for terms exceeding 20 years and shall perform all acts required by this Chapter. Every instrument of this type now in existence or hereafter executed shall be construed in conformity with the intent and purpose of this Chapter. No trustee, officer, or agent of a lessor or other legal or equitable owner, while acting pursuant to this Chapter, shall be deemed to be acting in bad faith or to have committed a breach of trust.

Sec. ___-1.6. Penalty. Any person who violates any provision of this Chapter shall be fined not more than $1,000.00 or imprisoned not more than one year, or both. All fines collected shall be deposited in the fee simple revolving fund created by Section ___-6.1.

Sec. ___-1.7. Administration of Chapter. The department of housing and community development shall administer this Chapter.

Sec. ___ -1.8. Department's Duties Generally. In addition to any other duty prescribed by law and in this Chapter, the director of the department of housing and community development shall:

(1) Within six months after the effective date of this Chapter, adopt in accordance with Chapter 91, Hawaii Revised Statutes, rules necessary to effectuate the purposes of this Chapter;

(2) Be responsible for enforcement of this Chapter and the rules adopted pursuant to it;

(3) Establish reasonable fees to be assessed and collected from lessees for the services of any appraiser;

(4) Disseminate information and render assistance to lessees of residential condominiums, cooperative housing developments and residential planned developments in order that this Chapter may be understood and effectively implemented;

(5) Conduct an investigation upon any written complaint or whenever it appears that a provision of this Chapter has been or is being violated. In the investigation, the director may examine the books, accounts, records, and files of any person connected with the matter under investigation and conduct hearings. If the director finds from satisfactory evidence that any person has violated or is violating this Chapter, the director may order the person to cease and desist from continuing the violation or engaging in or doing any act or acts in furtherance thereof and, where necessary, the director may bring an action in the name of the city and county of Honolulu in any court of competent jurisdiction for enforcement of its orders;

(6) Facilitate the acquisition of all necessary property interests by the city through eminent domain proceedings as provided in this Chapter;

(7) Facilitate the making and execution of contracts, mortgages, and other instruments necessary or convenient to the exercise of the powers of the city under this Chapter;

(8) From time to time, require from the lessors of leases of residential condominiums, cooperative housing developments and residential planned developments and from all fee owners and legal and equitable owners of such condominiums, cooperatives and planned developments subject to leases of land, such information as it may reasonably require in connection with the administration of this Chapter; and

(9) Do all things necessary and convenient to carry out the powers expressly conferred upon the director by this Chapter.

Sec. ___-1.9. Quitclaim Deeds. Unless otherwise provided by law, the city shall issue quitclaim deeds whenever it conveys, transfers, sells or assigns any property developed, constructed, or sponsored under this Chapter.

ARTICLE 2. CONDEMNATION OF CONDOMINIUM DEVELOPMENT LEASEHOLDS

Sec. ___-2.1. Applicability. This article applies to developments which, at the time of acquisition of the development by the City, are:

(1) Developed into condominium property regimes or occupied by residential lessees under leases or condominium conveyance documents executed before the effective date of this Chapter; or

(2) Developed or partially developed into condominium property regimes occupied or to be occupied by residential lessees under apartment leases or condominium conveyance documents executed on or after the effective date of this Chapter; provided, that 90 percent of the leases to units in the condominium have been executed.

Sec. ___-2.2. Designation of Development for Acquisition. (a) Subject to subsection (b), the department may designate all or that portion of a development containing residential condominium land for acquisition, and facilitate the acquisition of the applicable leased fee interests in that land by the City through the exercise of the power of eminent domain or by purchase under the threat of eminent domain, after:

(1) At least twenty-five (25) of all the condominium owners within the development or at least owners of fifty percent (50%) of the condominium units, whichever number is less, apply to the department to purchase the leased fee interest pursuant to section -2.4, and file an application with the department; and

(2) Due notice is given and a public hearing held, the time and place of which have been duly advertised in a newspaper of general circulation in the City and County of Honolulu, on at least three different days, the last publication being not less than five days before the date of hearing, the department finds that the acquisition of the leased fee interest in the development or a portion thereof, through exercise of the power of eminent domain or by purchase under threat of eminent domain and the disposition thereof as provided in this part, will effectuate the public purposes of this Chapter. For purposes of this subsection, "condominium owners" means the owner-occupants of the condominium development.

(b) The land designated and acquired by the City may consist of a portion of or the entirety of the land area submitted to the declaration of condominium property.

Sec. ___--2.3. Purchase of leased fee interest. The condominium lessees who have authorized approval and who have qualified for purchase of the leased fee interest, shall purchase from the City within 60 days of acquisition of the interest by the City, the leased fee interest appertaining to their condominiums, together with an undivided leased fee interest equal to the percentage of common interest appurtenant to the lessee's condominium units, subject to the terms, covenants, and conditions of the contract executed with the City. If any lessee refuses to enter into such a contract, then in that event,

such lessee shall pay to the City all costs incurred by the City in the acquisition of the appurtenant condominium leased fee interest within the development including but not limited to appraisal costs, costs of publication, and survey, and the department is authorized to take whatever action it deems necessary to collect the costs; and provided further, that in case of a willful breach of the purchase agreement, the City shall be entitled to any available remedy, including the sale of its interest in the condominium.

Sec. ___-2.4. Qualification for purchase. (a) No sale of any condominium land within a development shall be made unless the lessees:

(1) Are at least 18 years of age and are owner-occupants of their condominium units;

(2) Are bona fide residents of the City and County of Honolulu;

(3) Have legal title to, or pursuant to an agreement of sale, have an equitable interest in a condominium situated on the leased property applied for; provided that for purposes of this section, the vendor under such agreement of sale shall not be eligible to purchase that property. An "agreement of sale" means an executory contract for the sale and purchase of real property which binds one party to sell and the other party to buy property which is the subject matter of the transaction;

(4) Do not own property in fee simple lands suitable for residential purposes within the city and county of Honolulu or have pending before the State housing finance and development corporation, or the City department of housing and community development an unrefused application to lease or purchase residential real property for dwelling unit purposes. A person is deemed to own lands, for the purpose of this paragraph, if the person, the person's spouse, or both the person and the person's spouse (unless separated and living apart under a decree of a court of competent jurisdiction) own lands, including any interest in a land trust in the city and county of Honolulu;

(5) Submit a letter of credit, certificate of deposit, proof of funds, or approved application from any lending institution demonstrating that the lessees who are participating in the purchase of the fee interest will be able to pay the City promptly for the leased fee interests;

(6) Submit an application for the purchase of the leased fee interest in good faith, and in such form as is acceptable to the department; and

(7) Execute a contract for the purchase of the fee interest in such form as is acceptable to the department.

(b) In the event of a wilful breach of contract by the lessees, the City may sell or assign its interest without respect to the requirements of this section.

(c) The department may require additional testimony or evidence under oath in connection with any application. The determination by the department of any applicant's eligibility under this part shall be conclusive as to all persons thereafter dealing with the property; provided, that the making of any false statement knowingly by applicants or other persons in connection with any application shall constitute perjury and be punishable as such.

(d) The department shall adopt rules under Chapter 91, Hawaii Revised Statutes, to effectuate the purposes of this section.

Sec. ___-2.5. Deposits by lessees. (a) The department may require the submission of a deposit by lessees seeking to purchase the leased fee interest in their condominiums pursuant to this Chapter. The means of determining the amount of the deposit shall be established by rule.

(b) The deposit may be applied by the department to payment of appraisal, survey, attorney fees, administrative costs, and any other costs the department has incurred as a result of the designation, with the remainder of the deposit to be applied toward the purchase of the owner's fee interest. The department shall incur no liability for the deposits under this section.

Sec. ___-2-6. Preliminary negotiation required. (a) Upon the filing with the department of an application by the lessees in accordance with Sec. ~2.2(a)(l) of this Article, the department shall request the lessor and the lessees to negotiate the just compensation which the lessees will pay to the lessor to acquire the lessor's interest in the development. If no agreement is reached within 60 days after the request to negotiate, the parties shall simultaneously exchange written final offers together with any appraisals, other documents, and any other expert opinions on which their negotiating positions were based. Copies of the final offers and related documents shall be submitted to the department and the department may use the information in determining, prior to commencing condemnation proceedings, the probability that the lessees will be able to meet the financial requirements of section - -2.4(5).

(b) This preliminary negotiation shall be in advance of and shall not constitute any part of any action in condemnation or eminent domain.

Any offers, appraisals, other documents, or any other expert opinions giving a value of the lessor's interest in the condominium development which were prepared by a party for use in preliminary negotiations as provided for in this section, for setting qualification amounts pursuant to section -2.4(5) or for negotiations to determine the just compensation after designation to acquire the lessor's interest in the development, and were not prepared for use in the trial shall not be discoverable, usable, or admissible by an opposing or adverse party in any action, suit, or proceeding brought under this Chapter.

Sec. ___-2.7. Eminent domain trial. The parties to the eminent domain action brought under this Chapter shall be the City as plaintiff and the lessees, and the lessors and

all other necessary parties as defendants. All parties shall be given an opportunity to present evidence of the fair market value of the leased fee interest being acquired.

ARTICLE 3. CONDEMNATION OF COOPERATIVE HOUSING DEVELOPM[ENT LEASEHOLDS.

Sec. ___-3.1. Applicability. This Article applies to developments which, at the time of acquisition of the development by the City, are leased to cooperative housing corporations that sublease individual apartments to residential lessees under proprietary leases executed either prior to or after the effective date of this Chapter; provided that ninety per cent of the proprietary leases to the cooperative have been executed.

Sec. ___-3.2. Designation of development for acquisition. (a) Subject to subsection (b), the department may designate all of a development for acquisition, and facilitate the acquisition of the leased fee interests in the development by the City through the exercise of the power of eminent domain or by purchase under the threat of eminent domain after:

(1) The cooperative housing corporation applies to the department to purchase the leased fee interest pursuant to section -3.4 after the cooperative housing corporation receives approval from its shareholders; and

(2) If, after due notice and public hearing, the time and place of which have been duly advertised in a newspaper of general circulation in the City and County of Honolulu, on at least three different days, the last publication being not less than five days before the date of hearing, the department finds that the acquisition of the leased fee interest in the development, through exercise of the power of eminent domain or by purchase under threat of eminent domain and the disposition thereof as provided in this article will effectuate the public purposes of this Chapter. The development designated and acquired by the City shall consist of the entire land parcel leased to a cooperative housing corporation.

(c) Where the cooperative housing development consists of both residential and nonresidential units, the terms "development", "cooperatives", or similar terms when used in this article, including the provisions on acquisition, disposal, and financing of cooperatives and developments, shall be construed to apply only to the residential units.

Sec. ___-3.3. Purchase of leased fee interest. The cooperative housing corporation which has applied to the department and which has qualified for purchase of the leased fee interest, shall purchase from the City within 60 days of acquisition of the interest by the City, the entire leased fee interest appertaining to the cooperative subject to the terms, covenants, and conditions of the contract executed with the City provided that:

(1) If the cooperative housing corporation refuses to enter into such a contract, then it shall pay to the City all costs incurred by the City in the acquisition of the leased fee interest including, but not limited to, appraisal costs, costs of

publication, and survey, and the department is authorized to take whatever action it deems necessary to collect these costs; In case of a wilful breach of the purchase agreement, the City shall be entitled to any available remedy, including the sale of its interest in the cooperative.

Sec. ___-3.4. Qualification for lease or purchase. (a) No sale of any leased fee interest in a cooperative housing development to a cooperative housing corporation shall be made unless the cooperative housing corporation satisfies the following requirements:

(1) Submission of proof, in such form as is acceptable to the department, that a majority of the shareholders of the cooperative housing corporation have approved or ratified the purchase of the leased fee interest of the development;

(2) Submission of a letter of credit, certificate of deposit, proof of funds, or approved application from any lending institution demonstrating that the cooperative housing corporation will be able to promptly pay the City for the leased fee interest;

(3) Submission of an application for purchase of the leased fee interest in good faith, and in such form as is acceptable to the department;

(4) Execution of a contract for the purchase of the leased fee interest in such form as is acceptable to the department; and

(5) Submission of proof, in such form as is acceptable to the department, that at least 60 percent of the cooperative housing corporation consists of owner-occupant-shareholders of residential units within the affected cooperative housing development.

(b) In the event of a willful breach of contract by the cooperative housing corporation, the City may sell or assign its interest without respect to the requirements of this section.

(c) The department may require additional testimony or evidence under oath in connection with any application. The determination by the department of any applicant's eligibility under this part shall be conclusive as to all persons thereafter dealing with the property; provided that the making of any false statement knowingly by applicants or other person in connection with any application shall constitute perjury and be punishable as such.

(d) The department shall adopt rules under Chapter 91, Hawaii Revised Statutes, to effectuate the purposes of this section.

Sec. ___-3.5. Deposits by lessees. (a) The department may require the submission of a deposit by the cooperative housing corporation applying to the department

for the purchase of the leased fee interest pursuant to this Chapter. The amount of the deposit shall be established by rule.

(b) The deposit may be applied by the department to payment of appraisal, survey, attorney fees, administrative costs, and any other costs the department has incurred as a result of the designation, with the remainder of the deposit to be applied toward the purchase of the owner's fee interest. The department shall incur no liability for those deposits under this section.

Sec. ___-3.6. Preliminary negotiation required. (a) Upon the filing of a petition by the cooperative housing corporation with the department, the department shall request the lessor and the cooperative housing corporation to negotiate the just compensation which the cooperative housing corporation will pay to the lessor to acquire the lessor's interest in the development. If no agreement is reached within 60 days after the request to negotiate, the parties shall simultaneously exchange written final offers together with any appraisals, other documents, and any other expert opinions on which their negotiating positions were based. Copies of the final offers and related documents shall be submitted to the department and the department may use the information in determining, prior to commencing condemnation proceedings, the probability that the cooperative housing corporation will be able to meet the financial requirements of section ___.~-3.4(2).

(b) This preliminary negotiation shall be in advance of and shall not constitute any part of any action in condemnation or eminent domain.

Any offers, appraisals, other documents, or any other expert opinions giving a value of the lessor's interest in the land beneath the development, which were prepared by a party for use in

preliminary negotiations as provided for in this section, for setting qualification amounts pursuant to section -3.4(2) or for negotiations to determine the just compensation after designation to acquire the lessor's interest in the development, and were not prepared for use in the trial, shall not be discoverable, usable, or admissible by an opposing or adverse party in any action, suit, or proceeding brought under this Chapter.

Sec. ___-3.7. Eminent domain trial. The parties to the eminent domain action brought under this Chapter shall be the City as plaintiff and the cooperative housing corporation, lessors, landowners and all other necessary parties as defendants. All parties shall be given an opportunity to present evidence of the fair market value of the leased fee interest being acquired.

ARTICLE 4. CONDEMNATION OF RESIDENTIAL PLANNED DEVELOPMENT LEASEHOLDS

Sec. ___-4.1. Applicability. This Article applies to residential planned developments which, at the time of acquisition of the development by the City, are:

(1) Developed into residential planned developments and occupied by residential lessees under apartment leases or planned development conveyance documents executed before the effective date of this Chapter, or

(2) Developed or partially developed into such planned developments occupied or to be occupied by residential lessees under apartment leases or planned development conveyance documents executed on or after the effective date of this Chapter; provided that 90 percent of such leases to the planned unit development have been executed.

Sec. ___-4.2. Designation of development for acquisition. (a) Subject to subsection (b), the department may designate all or a portion of the land beneath a planned development containing residential units for acquisition, and facilitate the acquisition of the applicable leased fee interests in such land by the City through exercise of the power of eminent domain or by purchase under the threat of eminent domain, after:

(1) At least twenty-five (25) of all the owners within the development or at least owners of fifty percent (50%) of the residential units, whichever number is less, of all the owners within the planned development apply to the department to purchase the leased fee interest pursuant to section -4.4, and file the application with the department; and

(2) Due notice and public hearing, the time and place of which have been duly advertised in a newspaper of general circulation in the city and county of Honolulu, on at least three different days, the last publication being not less than five days before the date of hearing, the department finds that the acquisition of the leased fee interest in the development or a portion thereof, through exercise of the power of eminent domain or by purchase under threat of eminent domain and the disposition thereof as provided in this part will effectuate the public purposes of this Chapter.

For purposes of this subsection, "owners," as used in Sec. -4.2(a)(1) means the owner-occupants of the planned developments.

The land designated and acquired by the city may consist of a portion of or the entire land area submitted to the declaration of planned development.

Sec. 4.3. Purchase of leased fee interest. The planned development lessees, who have authorized approval and who have qualified for purchase of the leased fee interest, shall purchase from the city within sixty days of acquisition of the interest by the city, the leased fee interest appertaining to the planned development unit, together with an undivided leased fee interest equal to the percentage of common interest appurtenant to their units, subject to the terms, covenants, and conditions of the contract executed with the city; if any lessees refuse to enter into such contract, then in that event, those lessees shall pay to the city all costs incurred by the city in the acquisition of the relevant planned development within the development including but not limited to appraisal costs, costs of publication, and survey, and the department is authorized to take whatever action it deems necessary to collect the costs; and provided further that in case of a wilful breach of the

purchase agreement, the city shall be entitled to any available remedy, including the sale of its interest in the planned development.

Sec. ___ -4.4. Qualification for purchase. (a) No sale of any leased fee interest in land under a residential planned development land shall be made unless the lessees:

(1) Are at least eighteen years of age and are owner-occupants of their residential planned units;

(2) Are bona fide residents of the city and county of Honolulu;

(3) Have legal title to, or pursuant to an agreement of sale an equitable interest in a planned unit development situated on the leased property applied for; provided that for purposes of this section, the vendor under such agreement of sale shall not be eligible to purchase that property. An "agreement of sale" means an executory contract for the sale and purchase of real property which binds one party to sell and the other party to buy property which is the subject matter of the transaction;

(4) Do not own property in fee simple lands suitable for residential purposes within the city and county of Honolulu or have pending before the state housing finance and development corporation, or the city department of housing and community development an unrefused application to lease or purchase residential real property for dwelling unit purposes. A person is deemed to own lands herein if the person, the person's spouse, or both the person and the person's spouse (unless separated and living apart under a decree of a court of competent jurisdiction) own lands, including any interest in a land trust in the city and county of Honolulu;

(5) Submit a letter of credit, certificate of deposit, proof of funds, or approved application from any lending institution demonstrating that the lessees who are participating in the
purchase of the fee interest will be able to pay the City promptly for the leased fee interests;

(6) Submit an application for the purchase of the leased fee interest in good faith, and in such form as is acceptable to the department; and

(7) Execute a contract for the purchase of the fee interest in such form as is acceptable to the department.

(b) In the event of a wilful breach of contract by the lessees of the residential planned development, the City may sell or assign its interest without respect to the requirements of this section.

(c) The department may require additional testimony or evidence under oath in connection with any application. The determination by the department of any applicant's eligibility under this part shall be conclusive as to all persons thereafter dealing with the property; provided that the making of any false statement knowingly by applicants or other

persons in connection with any application shall constitute perjury and be punishable as such.

(d) The department shall adopt rules under Chapter 91, Hawaii Revised Statutes, to effectuate the purposes of this section.

Sec. ___-4.5. Deposits by lessees. (a) The department may require the submission of a deposit by lessees seeking to purchase the leased fee interest in their planned development housing unit pursuant to this Chapter. The amount of the deposit shall be established by rule.

(b) The deposit may be applied by the department to payment of appraisal, survey, attorney fees, administrative costs, and any other costs the department has incurred as a result of the designation, with the remainder of the deposit to be applied toward the purchase of the owner's fee interest. The department shall incur no liability for the deposits under this section.

Sec. ___-4.6. Preliminary negotiation required. (a) Upon the filing of a petition by the lessees with the department, the department shall request the lessor and the lessees to negotiate the just --compensation which the lessees will pay to the lessor to acquire the lessor's interest in the development. If no agreement is reached within 60 days after the request to negotiate, the parties shall simultaneously exchange written final offers together with any appraisals, other documents, and any other expert opinions on which their negotiating positions were based. Copies of the final offers and related documents shall be submitted to the department and the department may use the information in determining, prior to commencing condemnation proceedings, the probability that the lessees will be able to meet the financial requirements of section --4.4(5).

(b) This preliminary negotiation shall be in advance of and shall not constitute any part of any action in condemnation or eminent domain.

Any offers, appraisals, other documents, or any other expert opinions giving a value of the lessor's interest in the land beneath the planned development, which were prepared by a party for use in preliminary negotiations as provided for in this section, for setting qualifications amounts pursuant to section --4.4(5) or for negotiations to determine the just compensation after designation to acquire the lessor's interest in the development and were not prepared for use in the trial, shall not be discoverable, usable, or admissible by an opposing or adverse party in any action, suit, or proceeding brought under this Chapter.

Sec.___-4.7. Eminent domain trial. The parties to the eminent domain action brought under this chapter shall be the City as plaintiff and the lessees, lessors, landowners and all other necessary parties as defendants. All parties shall be given an opportunity to present evidence of the fair market value of the leased fee interest being acquired.

ARTICLE 5. EMINENT DOMAIN.

Sec. ___-5.1. Applicability. This article applies to developments which are created by condominium property regimes under Chapter 514A, Hawaii Revised Statutes, and to developments existing under cooperative housing corporation status, and to residential planned developments not covered by Chapter 516, Hawaii Revised Statutes.

Sec. ___--5.2. Exercise of power of eminent domain. Within 12 months after the designation of the development or portion thereof for acquisition, the department shall facilitate the acquisition of the leased fee interest in the land beneath the development by the city and county of Honolulu through voluntary action of the parties, or the institution of eminent domain proceedings to acquire the leased fee interest or portion thereof so designated. If the leased fee interest is not acquired or eminent domain proceedings are not instituted within the 12 month period, the city shall reimburse the fee owner, the lessor, and the legal and equitable owners of land so designated for actual out-of-pocket expenses they incurred as appraisal, survey, and attorney fees as a result of the designation.

Sec. ___ --5.3. Compensation. The compensation to be paid for the leased fee interest shall be the current fair market value of the leased fee interest. The compensation shall be determined as of the date of the summons of the complaint in eminent domain.

Sec. ___--5.4. Interest acquired. (a) Upon acquisition of a development or portion thereof as provided in this article, the property interest acquired by the City is all of the right, title, and interest of the fee owner, and of the lessor and fee owner and all legal and equitable owners, if any besides the lessor, in and to the development or portion thereof acquired, subject to all covenants, conditions, easements, reservations, and restrictions of record running with the land or contained in the agreement of sale, deed, or other conveyance held by the fee owner, lessor, and legal and equitable owners or permitted or suffered by lessees of existing residential condominium or cooperative housing corporation leases, which are not inconsistent with the intent of this article. The acquisition terminates all the right, title, and interest of the fee owner, lessor, and all legal and equitable owners, whether such interest be a remainder, vested or contingent, a reversion, or other beneficial interest in the property, present or prospective.

(b) If the apartment lease, condominium conveyance document, or proprietary lease is subject to any leasehold mortgage, lien, or encumbrance suffered or permitted by the lessee, including, but not limited to, rights arising through divorce, marriage, or assignment, the purchase of the leased fee by the lessee in no manner shall affect or impair such mortgage, lien, or encumbrance or the security afforded thereby to the holder thereof, and the leasehold shall continue, notwithstanding the purchase of the leased fee by the lessee, for the purpose and to the extent necessary to avoid any impairment of the leasehold security, unless the holder of the leasehold mortgage, lien, or encumbrance in writing consents to the transfer thereof to the fee and merger as provided in this Chapter. Upon written consent by the holder thereof, each leasehold mortgage, lien, or encumbrance to which the apartment lease, condominium conveyance document or proprietary lease is subject and to which the consent refers shall be transferred to and shall bind the fee acquired by the lessee, and thereafter shall continue in full force and effect as a mortgage, lien, or encumbrance of the fee acquired by the lessee, in the same order and priority

among such mortgages, liens, and encumbrances so transferred to the fee as the same applied to and bound the lessee's immediate, previous leasehold interest.

Sec. ___--5.5. Interest in compensation paid by the City. The lessor, the fee owner, and all legal and equitable owners shall share in the compensation paid by the City as their respective interest shall appear. Notwithstanding any provision to the contrary in any contract or lease, a developer or other person entitled to share in the lease rentals shall share in the compensation paid by the City to the extent of the person's interest as may be determined by agreement of those entitled to share in the compensation paid by the City and in the absence of such agreement pursuant to Chapter 658, Hawaii Revised Statutes.

Sec. ___--5.6. Compulsory or involuntary conversion. It is the intent of the council, within the meaning of section 1033 or section 1231 of the Internal Revenue Code or the applicable provisions of Chapter 235, Hawaii Revised Statutes, as well as all other statutes, rules, regulations, administrative orders, and legal interpretations within the federal and state governments relating to taxation, that any conveyance of title to property by a fee owner to the City under this part shall constitute a compulsory or involuntary conversion, as a result of the exercise of the power of condemnation or the threat of imminence thereof, and that the fee owner shall not, by reason in whole or in part of any provision of this Chapter or by reason of the execution by the fee owner of leases to the property -and other properties subsequent to the date of approval of this Chapter, be deemed to hold the property primarily for sale to customers in the ordinary course of trade or business.

ARTICLE 6. REVOLVING FUND.

Sec. ___-6.1. Fee simple condominium and cooperative and planned unit development revolving fund. A fee simple condominium and cooperative and planned unit development revolving fund is hereby created. The funds appropriated for the purposes of this Chapter and all moneys received or collected by the department of housing and community development under this Chapter shall be deposited in the revolving fund. The proceeds in the fund shall be used for the necessary expenses of the department, including administration, under this Chapter. All interest earned on moneys deposited by lessees into this revolving fund shall accrue to the lessees."

SECTION 3. If any article, section, sentence, clause, or phrase of this Chapter, or its application to any person or transaction or other circumstances, is for any reason held to be unconstitutional or invalid, the remaining articles, sections, sentences, clauses, and phrases of this Chapter, or the application of this Chapter to other persons or transactions or circumstances, shall not be affected. The council hereby declares that it would have passed this Chapter and each article, section, clause, or phrase thereof, irrespective of the fact that any one or more articles, sections, sentences, clauses, or phrases of this Chapter, or its application to any person or transaction or other circumstance, be declared unconstitutional or invalid.

SECTION 4. This ordinance shall take effect on January 1, 1992.

INTRODUCED BY:

John Henry Felix

_____
_____
_____
_____
_____
_____
_____
_____
Councilmembers

DATE OF INTRODUCTION:

December 28, 1990
Honolulu, Hawaii

APPROVED AS TO FORM AND LEGALITY:

_____
Deputy Corporation Counsel

APPROVED this _____ day of _____

FRANK F. FASI, Mayor
City and County of Honolulu

APPENDIX E

LEASEHOLD CONVERSION OF CONDOMINIUMS AND COOPERATIVE HOUSING PROJECTS PHASE I

Prepared for:
Housing Finance and Development Corporation

Prepared By:

Ezra, O'Connor, Moon & Tam
DHM Planners Inc.
John Child & Co. Inc.
Peat Marwick Main & Co.

November 1987

I. INTRODUCTION

This study was prepared in response to 1987 House Resolution 380 (H.R. 380), "House Resolution requesting the Hawaii Housing Authority to address issues related to leasehold conversion of condominiums and cooperative housing projects." (See Appendix 1)

H.R. 380 requested answers to specific questions related to the property beneath condominiums and cooperative housing projects, and to report its findings to the Legislature 20 days prior to the convening of the 1988 Session.

In May 1987 the Housing Finance and Development Corporation (HFDC), formerly part of the Hawaii Housing Authority, sent out a Request for Proposal to fulfill the requirements of H.R. 380. The consultant team of Ezra, O'Connor, Moon and Tam; DEM Planners Inc.; John Child and Company Inc.; and Peat Marwick Main and Co. were selected to prepare the report.

H.R. 380 requested that interviews be conducted with individuals with varying interests in the lease to fee conversion issue. A list of the persons interviewed is contained in Appendix 2 of this report.

This report represents Phase I of the study and consists of (a) the findings of the interviews, (b) research on the leasehold conversion issue, (c) responses to questions

in H.R. 380, and (d) conclusions and recommendations. HFDC grouped the questions into five different issue areas: General, Policy, Finance and Value, Legal and Tax. This report is organized according -to this grouping.

II. EXECUTIVE SUMMARY

A. CONCLUSIONS/RECOMMENDATIONS

The research and findings of the interviews conducted as a part of this study indicate that there are primarily five areas of concern in the leasehold condominium and cooperative housing system. Proponents of mandatory conversion legislation have raised these five areas of concern as objectives to be achieved by mandatory conversion legislation. They are:

1. Increasing fee simple home ownership
2. Breaking up the oligopoly of land ownership in Hawaii
3. Controlling lease rent
4. Freeing lessees from reversion of improvements provisions in surrender clauses
5. Increasing the number of fee simple condominium and cooperative housing units

The interviews and findings of available market data, which are discussed in detail in this study, do not suggest that a mandatory conversion law is the most effective means to obtaining the first four objectives. Some of these findings indicate:

- Condominium purchases have been dominated by non-owner occupants, and not by individuals seeking home ownership. Only 31 %, or approximately 16,400 of the leasehold residential condominium units in Hawaii, were owner occupied in 1984-1985.

- The oligopoly of land ownership which characterizes the single-family residential leasehold ownership pattern is not completely analogous to the pattern of land ownership underlying condominium and cooperative housing projects. Therefore breaking up the oligopoly of land ownership in Hawaii is not a public purpose which could support mandatory condominium and cooperative fee conversion.

- 89% or 415 of the landowners of the 754 condominium and cooperative projects in Hawaii own land under a single condominium or cooperative project.

- There is no market evidence to suggest that the pattern of renegotiated ground rents for condominiums and cooperatives is unreasonable. Since the late 1950s and

early 1960s, the growth rates between- original and renegotiated ground rents have been consistent with the growth of personal incomes, housing values and consumer prices over similar time periods.

- Voluntary fee conversion programs will provide no assurance that leasehold condominium and cooperative apartment owners will ultimately have the opportunity to purchase their leased fee, particularly in view of the severance damages arising from a sale of partial individual interests in the leased fee.

- A significant number of condominium and cooperative housing projects are scheduled for their first lease rental negotiations starting in 1990, and the ability to obtain long term fixed rate financing for leasehold condominium purchases will diminish as lease terms progress. Therefore, it is anticipated that motivations of lessees and lessors may change significantly as these negotiations draw closer, and that support for leased fee conversion relief will increase.

However, if a public purpose is to be identified as the basis for introduction of mandatory conversion legislation, then the fifth objective, increasing the number of fee Simple condominium and cooperative housing units, could support the introduction of such legislation. Research indicates that on Oahu, where the majority of residential condominium and cooperative projects are located, 60% or 518 of the projects and over 70% or 53,898 of the units are leasehold.

So long as the Legislature determines. that, fee simple ownership of condominium and cooperative housing units is a proper public purpose, mandatory condominium and cooperative fee conversion legislation should be upheld as a proper public use by a federal court following *Hawaii Housing Authority v. Midkiff* or a state court following *Hawaii Housing- Authority v. Lyman.*

In order to afford the Legislature an opportunity to explore a full range of alternative approaches, it is recommended that Phase II of this study explore two different legislative alternatives:

1. To prepare draft legislation for mandatory condominium and cooperative fee conversions to require conversion of 100% of the leased fee interest under a condominium or cooperative project with a high minimum threshold of applicants. The method would appear to be the most equitable manner to implement a mandatory leased fee conversion process.

2. To prepare limited purpose legislation addressing three issues: rent control, reversionary or surrender clauses in apartment leases and the power of apartment owner

associations and cooperative housing corporations to borrow and assess apartment owners to acquire leased fee interests.

The two alternative legislative proposals are recommended to provide the Legislature with a wide range of alternatives for their examination and consideration.

III. FINDINGS

A. General Issues

In 1987 there were approximately 69,300 units in 754 leasehold condominium, cooperative, planned development and cluster projects in the state of Hawaii. Approximately 51,572 units representing approximately 74.5% of all leasehold units were on land zoned for residential apartment use; 8.3% or approximately 5,725 units were on single-family residential-zoned land, and 15.6% or approximately 10,790 units were on mixed apartment/commercial, commercial or industrial zoned land.

Approximately 16,400 units representing 31% of the leasehold residential condominium units in Hawaii were owner occupied in 1984-1985. The highest owner occupancy rate is on Oahu, where nearly 16,000 units or about 34% of all residential units were owner occupied. The owner occupancy rate on the neighbor islands is considerably lower, between 2.9% and 11.5%, having a total of approximately 424 units which were owner-occupied.

In a sample of 66 leasehold projects, all the ground leases extend for at least 50 years, and typically for a term of between 55 and 75 years. By 2040, the leases for over 477 projects representing 75% of all existing projects will have expired. Approximately 57 of the 66 projects sampled, about 87%, have known rent periods ranging between 25 and 35 years. Approximately 56 of the leasehold projects sampled have renegotiated rent periods between 25 years and 40 years. The ground rents during the known and renegotiated rent periods are typically fixed in increments of 5, 10 and 15 years. Rent escalations during the known rent period range typically between 1.0% and 2.9% per year.

The leases for over 50 of the leasehold projects sampled provide for the renegotiated rents to be based on a stated rate of return on the fair market value of the land at the time of rent renegotiation. The rent renegotiation clauses for the remaining projects sampled provide for renegotiation based on fair market rent, a percentage of the rent paid to a master lessor, or rent increases based on the change in the consumer price index. The compound rate of growth between the original and renegotiated ground rents typically ranges between about 1.0% and 5.0% per year. Leases for about 59,200 units in 616 projects, about 90% of the leasehold units in Hawaii, provide for renegotiation of their ground rents between 1990 and 2015.

The median monthly ground rent for the urban Oahu projects sampled was approximately $0.084 per square foot of net apartment area. The monthly median ground rent for suburban Oahu projects sampled was approximately $0.038 per square foot of net apartment area.

As of the date of this study, lessors of 42 leasehold condominium projects (4,870 units) have voluntarily sold leased fee interests to apartment owners. Most of these sales occurred between 1984 and 1987. The participation rate of purchasers for the projects sampled ranges between 2% and 98%. Approximately 3.9% of all leasehold condominium units in Hawaii have been voluntarily converted.

There is no apparent correlation between the owner occupancy rate in a project and the participation rate in the lease to fee conversion. There is also no significant correlation between the length of the remaining fixed rent period and the lease to fee conversion participation rate.

Leasehold projects in Hawaii occupy approximately 1,920 acres. The largest concentration of leasehold condominium development, with 68% of the total (1,298 acres), is on Oahu. The median and mean lot areas are 38,480 square feet and 110,955 square feet, respectively. 577 projects (78%) are located on sites of three acres or less.

B. POLICY ISSUES

The interviews conducted for this study and research into the background and legislative history of the mandatory conversion issue indicate that there are primarily five areas of concern in the leasehold condominium and cooperative housing system. Proponents of mandatory conversion have stated these areas of concern as objectives of mandatory conversion legislation. They are:

1. Increasing fee simple home ownership
2. Breaking up the oligopoly of landownership in Hawaii
3. Controlling lease, rent
4. Freeing lessees from reversion of improvements provisions in surrender clauses
5. Increasing the number of fee simple condominium and cooperative housing units

The available market data collected for this study indicates:

- Non-owner occupants dominate condominium purchases, not individuals seeking home ownership. Approximately 16,400 or 31% of the leasehold condominium units in Hawaii were occupied by owners in 1984-1985.

- The average participation rate in voluntary conversion for non-owner occupants (54.8%) is greater than the average participation rate (32.9%) for owner occupants, a statistic which indicates that purchasers may be motivated by considerations other than the desire to own land under one's residence.[1]

[1] Based upon research of motivations of those who did and did not participate in voluntary conversions.

- Ownership of land lease for condominium and cooperative projects in Hawaii is dominated by small landowners. Approximately 89% or 415 of these lessors own land under a single condominium or cooperative housing project.

- Condominium and cooperative apartment lessees have not yet experienced the significant lease rent increases experienced by single-family residential lessees. Very few condominium and cooperative lessors and lessees have renegotiated their lease rents as of this date. The few renegotiations that have occurred to date are based on annual compound rates of growth ranging from 1 % to 5 % of the original ground rents.

- Many lessees say that they were not informed about the reversion of improvements provisions in surrender clauses. They feel that the clause operates unfairly.

The available market data relating to leasehold condominiums and cooperative housing projects does not suggest that a mandatory conversion law is the best means to obtaining the first four objectives mentioned previously. However, if a public purpose is to be identified as the basis for introduction of mandatory conversion legislation, then the fifth objective, increasing the number of fee simple condominium and cooperative housing units, could support the introduction of such legislation.

Alternatives to address the first four objectives listed previously include:

1. Lease rent control legislation
2. Legislation to modify reversion of improvements provisions in surrender clauses

If increasing the number of fee simple condominium and cooperative housing units is the designated public purpose of mandatory conversion legislation, then there should not be any restrictions, such as owner occupancy or first time landownership, on participation in a mandatory conversion program.

Similarly, if the objective is to increase the number of fee simple *condominium and* cooperative housing units, then all types of residential condominiums and cooperative housing corporations should be included in a mandatory conversion program. The fee underlying the typical high rise *condominium and* cooperative housing corporation building, would be subject to conversion, as well as the fee underlying cluster developments, planned development housing, and mixed commercial/residential buildings.

If mandatory fee conversion is implemented, HFDC's primary role should be advisory and administrative. Enabling legislation could authorize HFDC to acquire leased fee interests on an interim basis, in order to transfer the leased fee interests to individual lessees; or to transfer the interests that are not purchased by individual lessees to a condominium association or cooperative corporation.

For condominium projects, a relatively high minimum percentage of lessees should be required to petition HFDC to initiate condemnation of the leased fee. HFDC should also be empowered to condemn 100% of the leased fee interest. It is also recommended that the association be required to purchase the leased fee interest of those lessees who are unwilling to purchase the fee at the time of conversion.

In the absence of a mandatory unanimous fee conversion requirement, the lessees who do not choose to participate in a fee conversion would continue to lease land underlying their units from the landowner, or they could lease from the condominium owners' association, or whoever purchases the leased fee.

A mandatory unanimous conversion would avoid the inequitable situation that would result to a lessor who would be left with a minority undivided remnant leased fee interest in a project or a building that remains beyond the term of the original lease.

For cooperative housing corporations, a lower minimum percentage (51%) of apartment owners should be required to petition the HFDC to initiate condemnation of the leased fee, but the corporation must purchase the entire leased fee. Since a cooperative has a single lease from the landowner, and the cooperative is organized as a corporation, a simple majority can and should be able to bind all apartment owners.[2]

* * * * *

3. *Who owns condominiums and apartments in cooperative housing projects, transients or investors, and the age ranges of owners or stockholders?*

Based on the number of homeowner's exemption claims for real property taxes, approximately 31% of the leasehold residential condominium units (16,415 units) in the State of Hawaii in 1984-1985 were occupied by owners, as shown in Exhibit F.

The owner occupancy rate is highest on Oahu, at approximately 34% or nearly 16,000 of leasehold units. The owner occupancy rate on the neighbor islands ranges between 2.9% and 11.5%, substantially below the rate on Oahu. Neighbor island units are more likely to be located in resort areas and are often used for second home occupancy and resort rentals.

There were no owner occupants for condominium units classified as "Hotel" by their respective County Tax Offices.[3] Based on data for 1984, there were 5,218 leasehold condominium units in the State of Hawaii which were classified as being used for "Hotel" or short-term rental use, none of

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[2] Under general principles of corporate law, majority vote of the stockholders is sufficient to bind all stockholders unless the articles of incorporation on by-laws otherwise provide.

[3] Based on those leasehold condominiums with a 700 Pitt Code classification which denotes properties used for hotel purposes; actual uses may differ.

which were occupied by home owners. The distribution of these leasehold units by County is shown in Exhibit G.

* * * * *

The data does not support the conclusion that there is an oligopoly of the ownership of land underlying condominium and cooperative projects. Thus a mandatory conversion law may result in a dilution of ownership of fee simple land underlying condominium and cooperative. projects but would not break up any perceived oligopoly.

* * * * *

MOTION FILED
JUL 1 1998

No. 97-1958

In the

Supreme Court of the United States

October Term, 1997

SMALL LANDOWNERS OF OAHU, *et al.*,
Petitioners,

v.

CITY AND COUNTY OF HONOLULU,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Pacific Legal Foundation (PLF) respectfully submits this motion for leave to file the annexed brief amicus curiae pursuant to Supreme Court Rule No. 37.[1] Consent to the filing of this brief has been granted by counsel for petitioners Small Landowners of Oahu and Richard S. H. Wong, *et al.*, Trustees of the Kamehameha Schools Bernice Pauahi Bishop Estate, and has been lodged with the Clerk of this Court. Consent has been withheld by counsel for respondent City and County of Honolulu.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of litigating in the public interest. With over 25,000 members and contributors nationwide, PLF is the largest and most experienced public interest law foundation supporting mainstream Americans who believe in limited government, free enterprise, and individual freedom. PLF's policies are set by a volunteer Board of Trustees, who authorize the filing of amicus briefs when such participation may be of assistance to the Court.

Amicus seeks to augment the argument in the petition for writ of certiorari. PLF believes that its public policy perspective and litigation experience will provide an additional viewpoint regarding the underlying constitutional issues in this case. PLF has participated in numerous cases before this Court involving the protection of rights guaranteed by the Takings Clause of the Fifth Amendment. PLF attorneys were counsel of record in

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae Pacific Legal Foundation affirms that no counsel for any party in this case authored this brief in whole or in part; and furthermore that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

Nollan v. California Coastal Commission[2] and *Suitum v. Tahoe Regional Planning Agency*,[3] and participated as amicus curiae in *Hawaii Housing Authority v. Midkiff*,[4] *Agins v. City of Tiburon*,[5] *Keystone Bituminous Coal Association v. DeBenedictis*,[6] *Hodel v. Irving*,[7] *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*,[8] *Lucas v. South Carolina Coastal Council*,[9] *Dolan v. City of Tigard*,[10] and *Babbitt v. Youpee*.[11]

In *Hawaii Housing Authority v. Midkiff*, this Court established an extremely deferential standard for reviewing determinations of "public use" by state legislatures under the Takings Clause of the Fifth Amendment. However, this Court did not intend that such determinations should receive no effective judicial review whatsoever. Moreover, the reasoning of *Midkiff*, supporting deference to the public use determinations of *state* legislative bodies, does not apply to the corresponding findings of *local* governments such as the City and County of Honolulu. This case involves an egregious abuse of the power of

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[2] 483 U.S. 825 (1987).

[3] 117 S. Ct. 1659 (1997).

[4] 467 U.S. 229 (1984).

[5] 447 U.S. 255 (1980).

[6] 480 U.S. 470 (1987).

[7] 481 U.S. 704 (1987).

[8] 482 U.S. 304 (1987).

[9] 505 U.S. 1003 (1992).

[10] 512 U.S. 374 (1994).

[11] 117 S. Ct. 29 (1997).

eminent domain by a local government, authorizing the forced transfer of private property from one private owner to another with no use of public funds, pursuant to a "public use" rationale that can best be regarded as an impossibility. Under these circumstances, this amicus will argue that *Midkiff's* deference should not apply and the ordinance at issue in this case should be struck down as a purely private taking, in violation of the Fifth Amendment.

For the foregoing reasons, Pacific Legal Foundation requests that this motion for leave to file the annexed brief amicus curiae be granted.

DATED: June, 1998.

Respectfully submitted,

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QUESTIONS PRESENTED FOR REVIEW

1. Whether deferential, rational-basis review is appropriate for all compensated takings of private property, even when the taking does not alter the use of the property or produce any social surplus; the lawmaking body at issue is a local, rather than a state, government; and the compensation is provided not from public funds but from the private parties for whose benefit the expropriation is occurring.

2. Whether this Court's decision in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), should be limited to the extent it suggests that deferential, rational-basis review is appropriate for all compensated takings of private property.

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

> [T]he Government ought not to have the capacity to give itself immunity from a takings claim by the device of requiring the transfer of property from one private owner directly to another.

Eastern Enterprises v. Apfel, 1998 WL 332966, at *39 (U.S. Sup. Ct. June 25, 1998) (Kennedy, J., concurring in the judgment and dissenting in part).

INTERESTS OF AMICUS CURIAE

The interests of amicus are set forth in the preceding motion for leave to file brief amicus curiae of Pacific Legal Foundation.

STATEMENT OF THE CASE

This case is about a governmental taking of property from one class of private owners in order to transfer it to another, larger class of private owners, devoid of a constitutionally required public purpose. Relying on an overbroad reading of this Court's 1984 decision in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, the court below upheld the City and County of Honolulu's use of its eminent domain power to force owners of land under condominium apartment buildings to transfer their land to the condominium apartment owners.

As appears in Section I below, the alleged public purpose advanced for the measure in question--Honolulu's Ordinance 91-95--masks a simple transfer of ownership from a comparatively powerless group of mostly small landowners to a comparatively large and politically powerful group of apartment owners. The declaration of public purpose contained in Ordinance 91-95 is, in most important respects, identical to that of Hawaii's Land Reform Act of 1967, upheld by this Court in *Midkiff*. However, in contrast to the public purpose rationale underlying the Land Reform Act, in the case at bar there is no

oligopoly of landowners and no threat to the local economy that can conceivably be eliminated by Ordinance 91-95. Moreover, events that have transpired since *Midkiff* have shown that none of the public benefits ostensibly sought by the Land Reform Act in fact ensued. Therefore, what was at least arguably a legitimate public purpose for the Land Reform Act is simply not a conceivable public purpose for Ordinance 91-95. Indeed, the public purpose rationale recited to justify Ordinance 91-95 is an impossibility.

Over the past 35 years, many small landowners made available to developers of condominium apartment buildings their fractional fee simple interest in their land. These arrangements represented investments for most of these small landowners, many of whom have held these lands for generations. Those who chose to purchase leasehold condominiums in these buildings knew that their ground rents were subject to change at certain times and, depending upon the market, that the change would result in an increase in rent. Those that chose not to take such a risk purchased condominiums on land held in fee simple by a condominium owners' association, with no ground rent.

Land in Hawaii increased in value during most of this 35-year period because of both the desirability of living in Hawaii and the scarcity of land available for urban development. Under Hawaii's statewide zoning law, less than 4% of the land area of the entire state is classified for urban use.[1]

Faced with increasing land values and concomitant ground rent increases, disgruntled condominium owners commenced a campaign for legislative relief to force ground lessors to sell their land to them. The condominium owners first targeted the broadly representative Hawaii State Legislature which had enacted the Land Reform Act of 1967, upheld by this Court in

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[1] *See* David L. Callies, *Regulating Paradise: Land Use Controls in Hawaii* 7 (U. of Hi. Press, 1984).

Midkiff. However, the condominium owners repeatedly failed to achieve their goal of acquiring the property of their landlords. Studies commissioned by the legislature uniformly found that the condition and situation of these lessees, and the market facts of life of which they complained, were not remotely similar to the conditions that justified passage of the Land Reform Act.

Rebuffed by the state, the condominium owners ultimately persuaded the City Council of Honolulu (by a narrow 5-4 margin) to pass a bill that was so obviously and transparently designed to strip the rights of one class of landowners in order to benefit another class that the mayor of the city refused to sign the bill which eventually became Ordinance 91-95. Under Ordinance 91-95, the city bears no financial burden of compensation whatsoever. Compensation--even the city's overhead and administrative costs allocable to the condemnations--is paid by the proud new owners of their former landlord's property.

This Court cannot and must not tolerate such an abuse of its *Midkiff* decision. When local government uses its eminent domain power to take real property from A in order to give it to B without any meaningful impact on anyone else or the community at large, the taking is purely private and must surely violate the Public Use Clause of the United States Constitution's Fifth Amendment.

REASONS FOR GRANTING THE PETITION

I

THE CITY AND COUNTY OF HONOLULU ORDINANCE 91-95 EXCEEDS THE PUBLIC PURPOSE STANDARD ESTABLISHED IN *MIDKIFF* AND IS AN UNCONSTITUTIONAL TAKING OF PROPERTY FOR A PRIVATE PURPOSE

The city's condominium fee conversion ordinance's public purpose goes beyond what is permissible under the United States Supreme Court's broad standard set in *Hawaii Housing*

Authority v. Midkiff. While broad, the *Midkiff* standard has limits. The public purpose must be conceivable and with a rational foundation. In 1967, the Hawaii State Legislature "conceivably" thought that Hawaii's Land Reform Act could serve the public purpose of breaking up an oligopoly in fee simple ownership of single-family residential housing and that such a break-up would lower the price of single-family housing in Hawaii. As appears below, however, neither happened. As the Ninth Circuit states in its opinion, the city's ordinance is identical in many respects to the Land Reform Act upheld by this Court in *Midkiff*. A reading of the ordinance reveals that in most important respects it is the same. It necessarily follows that the public purposes are the same. Confronted with a public purpose that utterly failed to materialize after *Midkiff*, the City Council's virtually identical public purpose must surely be characterized as not only unreasonable but a virtual impossibility. Because it is based upon an inconceivable public purpose, Ordinance 91-95 is, therefore, unconstitutional.

A. The Standard Established in *Midkiff*, While Broad, Is Not Without Limit

The standards set by this Court in reviewing a legislature's judgment of what constitutes a public use is broad and deferential:

> [W]here the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause.

467 U.S. at 241. Indeed, the Court quoted with approval from earlier cases holding that "deference to the legislature's 'public use' determination is required 'until it be shown to involve an impossibility[,]'" (*see Old Dominion Co. v. United States*, 269 U.S. 55, 66 (1925)) and that the Court will not substitute its judgment for a legislature's judgment as to what constitutes a public use "unless the use be palpably without reasonable foundation." *United States v. Gettysburg Electric Railroad Co.*,

160 U.S. 668, 680 (1896). Nevertheless, this Court made it crystal clear in *Midkiff* that:

> There is, of course, a role for courts to play in reviewing a legislature's judgment of what constitutes a public use, even when the eminent domain power is equated with the police power.

467 U.S. at 240. Although this Court noted that a court's role is an extremely narrow one, it nevertheless cited with approval cases in which this Court has "repeatedly stated that '*one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid.*'" *Midkiff*, 467 U.S. at 241 (citing *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55 (1937) (challenging a gas proration order by state railroad commission) (emphasis added)); *see also City of Cincinnati v. Vester*, 281 U.S. 439 (1930) (challenging excess condemnation by city for road widening); *Madisonville Traction Co. v. Saint Bernard Mining Co.*, 196 U.S. 239 (1905) (challenging traction company's condemnation of private land); *Fallbrook Irrigation District v. Bradley*, 164 U.S. 112 (1896) (challenging condemnation/land sale by judgment collector for San Diego County).

The City and County of Honolulu has gone well beyond what this Court envisioned in *Midkiff*. The city's ordinance is a naked transfer of property from one (small) group of private persons--a heterogeneous assemblage of lessors--for the benefit of another (much larger) group of private persons--lessees of apartments held as condominiums. On the facts of this case, the city could not possibly have reasonably believed that this transfer was related to the public purposes set out in the following section. This inter-private transfer is, beyond simple recitation of a public purpose mantra, without any palpable foundation. The avowed public purpose is, on the facts, an impossibility. Furthermore, "[w]hen a statute authorizes a single taking for uses both public and private [without limiting the taking to public use] such that private use cannot be disregarded and the uses are so

commingled that they cannot be separated, then the whole statute authorizing the taking is unconstitutional." 2A Julius L. Sackman, *Nichols on Eminent Domain* § 7.03[5][d] (Revised 3rd ed., 1997).

B. The Public Purpose in the City's Ordinance Is Virtually the Same as That in the State's Land Reform Act

Except for some tautological references in the city ordinance to landowners owning virtually all the land under condominiums, the purposes set out in the Honolulu Ordinance and the Hawaii Land Reform Statute are virtually the same. Both inveigh against an alleged shortage of fee simple land for residential purposes. Both blame such alleged shortage for high home prices. Both claim such high home prices are economically disruptive. Both blame landowner-lessees for the alleged shortage and alleged lack of choice between leased and fee simple land underneath condominium apartments and single-family residences. Both allege the existence of an oligopoly. Finally, both declare that it is necessary to condemn the land of the lessors and convey it to the lessees in order to remedy these alleged problems and abuses.

Even if all the above are accurately stated and are of public concern and consequence, it is nevertheless inconceivable that Honolulu's City Council could have reasonably believed the condemnation of lessor-landowner's land would provide a solution.

C. After the Economic Development Following *Midkiff*, No Legislative Body Could Conceivably or Reasonably Believe That Such an Ordinance Could Possibly Effectuate Its Stated Goal

Three decades have passed since Hawaii enacted its Land Reform Act, and 14 years have passed since this Court decided *Midkiff*. The evidence is overwhelming that the State's Land

Reform Act utterly failed to serve its articulated public purposes. As noted by the Director of the University of Hawaii's Hawaii Real Estate Center, instead of falling, prices escalated after the *Midkiff* decision.[2] A 1993 study by the University's Department of Economics reached the same conclusion.[3] Indeed, the price of fee simple single-family homes vastly exceeds the price of such homes on leased lots, and the rise in land values generally continues unabated.[4]

It is clear, both from the aftermath of *Midkiff* and the plethora of evidence submitted to the City Council, that the city condominium leasehold reform ordinance will have no effect upon a mythical oligopoly and the opposite effect on prices of condominiums. The price of leasehold condominiums (the alleged evil) will almost certainly drop, and the price of fee simple condominiums will almost certainly rise, just as occurred in the single-family residential market following *Midkiff*. It is both inconceivable and impossible that the city could seriously have believed otherwise. It is no longer plausible to claim that a land reform scheme modeled after the State Land Reform Act, as

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[2] *See* Nicholas Ordway, *Modeling Long Term Impacts of a Hypothetical Residential Condominium Lease on Lessors and Lessees in Hawaii* 7, 12 (1991).

[3] *See* Sumner La Croix & Louis Rose, *Does the Emperor Have Any Clothes? An Economic Analysis of Hawaii Land Reform and the Fifth Amendment* (Oct. 1993).

[4] *See* Hawai`i State Auditor and Locations, Inc., *Study of Resale of Leasehold Properties Converted to Fee Simple Ownership Under the Hawai`i Land Reform Act of 1967* 40 (1992); Ordway, *Modeling Long Term Impacts of a Hypothetical Residential Condominium Lease on Lessors and Lessees in Hawaii* 43; Department of Business and Economic Development, *The State of Hawaii Data Book 1987: A Statistical Abstract* 588 (1987); Department of Business and Economic Development, *The State of Hawaii Data Book 1990: A Statistical Abstract* 549 (1990).

proposed and enacted by Honolulu, can reasonably, conceivably, or possibly accomplish the stated public purposes. Such a claim is palpably without reasonable foundation. We therefore respectfully urge this Court to review such an egregious violation of its public purpose standards as set out in *Midkiff*, so as to place proper limits on public purpose declarations required by the Fifth Amendment.

D. City Ordinance 91-95 Results in an Unconstitutional Taking of Property Contrary to the Public Purpose Clause of the Fifth Amendment

In the words of Judge O'Scannlain:

> If the [public purpose] clause is to have any effect at all, it must mean that a court will not feign blindness when it sees through a patently transparent legislative recital that a taking is for a public use. When the government uses eminent domain to take real property from A and give it to B, with no meaningful impact on anyone else or on the community at large, the taking is purely private and should violate the Public Use Clause.

Richardson v. City and County of Honolulu, 124 F.3d 1150, 1168 (9th Cir. 1997) (O'Scannlain, J., concurring/dissenting). Regrettably, this is precisely what has occurred since *Midkiff*. Legislative bodies are taking from A and giving to B on the basis of transparently spurious recitals of public use, and courts are feigning blindness when confronted with challenges from landowners. This Court has made it abundantly clear that:

> We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or the Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances.

Dolan v. City of Tigard, 512 U.S. 374. Nor should the Public Purpose Clause be further "emasculated."[5]

While mindful of the distinction between regulatory takings and eminent domain, we nevertheless fear that the same "legislative creativity," against which this Court so forcefully inveighed in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), increasingly has permeated eminent domain cases as well. Courts uphold such transparent declarations of public purpose, citing *Midkiff* as their primary authority, relegating the Fifth Amendment's Public Purpose Clause not only to the status of a poor relation but, in some instances, kicking it out of the constitutional family altogether.

In *Roberts v. City of Worcester*, the city was permitted to acquire land based upon a recent urban renewal plan that entailed immediately conveying the land to new owners for purposes of a medical complex project. 635 N.E.2d 1365 (Mass. 1994). Citing *Midkiff*, the Massachusetts Judicial Court stated: "We need not resolve these contending positions because the defendants have the right in the circumstances to exercise the power of eminent domain. . . . Certainly, there is no valid basis to challenge the public purpose behind the proposed takings in this case." *Id.* at 1366; *see also Benevolent & Protective Order of Elks, Lodge No. 65 v. Planning Board of Lawrence*, 531 N.E.2d 1233 (1988).

In *New Jersey Housing and Mortgage Finance Agency v. Moses*, the trial court noted that the "condemnation involved the taking of property from one private owner and ultimately transferring it to another." 521 A.2d 1307, 1308 (N.J. 1987). The trial court held in favor of the landowner, because the intended use, a shopping center, would primarily serve a private corporation. *Id.* However, the appeals court reversed, because the statute provided for such a "support" facility and the "success

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[5] *See* 8A Patrick J. Rohan & Melvin A. Reskin, *Nichols on Eminent Domain* § 26.04[2][iv] (Revised 3rd ed. 1997).

of the Legislature's primary goal of providing housing w[ould] obviously be hampered[.]" *Id.* at 1310.

In *City of Bellevue v. Painter*, the appeals court upheld the city's condemnation of land for a sedimentation pond even though it was outside of its boundaries. 795 P.2d 174 (Wash. App. 1990).

In *City of Oakland v. Oakland Raiders*, the Oakland Raiders, a successful National Football League franchise, attempted to move operations to Los Angeles; the City of Oakland attempted to enjoin this move through its eminent domain statute. 203 Cal. App. 3d 78, 80 (1988). Although the judgment of the appeals court favored the Raiders, it had no effect on the California Supreme Court's astounding earlier holding that condemning personal property such as a football franchise was no different from condemning land for a municipal football stadium. *City of Oakland v. Oakland Raiders*, 646 P.2d 835, 840-41 (1982). As the chief justice observed in dissent: "It strikes me as dangerous and heavy-handed for the government to take over a business, including all of its intangible assets, for the sole purpose of preventing its relocation." 646 P.2d at 846 (Bird, C.J., concurring/ dissenting).

In *Laurence v. Stonewall*, the court upheld expanded condemnation for a sewage lagoon to include a boat launching ramp on the ground it served public recreational purposes. 503 So. 2d 260 (Miss. 1987).

In *Condemnation of .036 Acres, More or Less, of Land Owned by Wexford Plaza Associates*, the court upheld the condemnation of private land for a road to a private shopping center complex. 674 A.2d 1204 (Pa. 1996).

Finally, in *Dyer v. Texas Electric Service Co.*, the Texas Court of Appeals upheld as a public use the condemnation of land for a tap line, even though it was to serve only a single customer. 680 S.W.2d 883 (Tx. App. 1984).

Indeed, we have been hard pressed to find many cases decided in the last 14 years that have struck down an exercise of eminent domain on public purpose grounds, besides those decided on largely technical grounds.[6] *See Public Service Co. of Oklahoma v. B. Willis, C.P.A., Inc.*, 941 P.2d 995 (Okl. 1997) (finding that utility did not create a presumption of necessity of acquiring land for purchase merely by filing condemnation petition and utility was required to demonstrate public purpose and necessity existed). Those scant few that go beyond mere technicalities, however, subject local government public purpose declarations to the kind of scrutiny which this Court used in striking down local condemnations on public purpose grounds in *City of Cincinnati v. Vester*, 281 U.S. 439, and *Rindge v. Los Angeles*, 262 U.S. 700 (1923). We discuss these cases in the context of our burden-shifting argument in Section II below.

Therefore, we respectfully urge this Court to breathe life into the Public Purpose Clause of the Fifth Amendment and reject the alleged "public purpose" of Ordinance 91-95 as being palpably without reasonable foundation.

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[6] *City of Mesa v. Smith Company of Arizona, Inc.*, 816 P.2d 939 (Ariz. App. 1991) (holding statute listing purposes for which power of eminent domain may be exercised did not give city authority to condemn private land for cemetery expansion purposes); *County of De Kalb v. Smith*, 572 N.E.2d 379 (Ill. App. 1991) (holding that the county's statutory authority to maintain a courthouse, jail, and necessary county buildings did not impose an imperative duty to provide off-street parking and did not give the county authority to condemn property); *Olson v. Whitpain Township*, 595 A.2d 706 (Pa. 1991) (holding that a second class township did not have the authority to acquire property by condemnation for recreational purposes); *City of Tempe v. Fleming*, 815 P.2d 1 (Ariz. App. 1991) (holding that eminent domain cannot be used to abate a nuisance).

II

IT IS UNWARRANTED AND IMPROPER TO EXTEND TO LOCAL GOVERNMENT THE DEFERENTIAL STANDARD OF REVIEW WHICH THE COURT EXTENDED TO STATE LEGISLATURES IN *HAWAII HOUSING AUTHORITY v. MIDKIFF*

In *Midkiff*, this Court used an extremely deferential standard of review in upholding Hawaii's Land Reform Act. Of course, as was noted by Judge O'Scannlain in his separate opinion below, this Court uses a vastly less deferential standard of review in regulatory takings cases (as compared with eminent domain), at least since its opinions in *Nollan v. California Coastal Commission*, *Lucas v. South Carolina Coastal Council* and, most particularly, *Dolan v. City of Tigard*. It may very well be that a heightened standard of review is more necessary where, as in a police power regulation, a great risk arises that a taking may be initially uncompensated. Here, however, we address a different question: are there reasons to hold local governments--such as the City and County of Honolulu--to a more strict standard than a state in exercising legislative authority by condemning land? We think that there are.

A. Presumptions in Favor of State Legislatures Ought Not and Do Not Extend to City Councils

We begin with Justice Brennan's proposition that our governmental system "has no place for sovereign cities." *Community Communications Co., Inc. v. City of Boulder*, 455 U.S. 40, 53 (1982). We accord our states and their legislatures substantial deference because this is a federal system with a national government created by the states, which are the ultimate repositories of sovereignty under our federal system.[7] Cities are mere creatures of the state, which states can create or abolish at will, absent heinous ulterior motives such as

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[7] *See* Daniel R. Mandelker, Dawn C. Netsch, Peter W. Salsich, & Judith W. Wegner, *State and Local Government in a Federal System* 10-37 (4th ed. 1996).

perpetuating racial segregation. *See Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

Given this basic and fundamental distinction between state and local governments, there are a number of reasons why deference to state legislators and legislation should not be extended to local governments:

1. Local government politics is significantly different from state (and federal) politics, particularly with respect to territorality. The Federal Constitution protects nonresidents from discriminatory state legislation through such protections as the Commerce and Privileges and Immunities Clauses, but not from unfair burdens imposed by local government regulations.

2. There is a resultingly greater likelihood of majoritarian tyranny and minority exclusion at the local government level, particularly with respect to those guarantees of minority rights provided by the Bill of Rights. It should be a matter of grave constitutional concern when local governments reallocate property rights among private citizens. Here, Honolulu has taken the fee simple interests of landowners and transferred that land to condominium apartment owners, merely because such apartment owners allegedly cannot afford market rents for the land beneath their buildings. Such a taking is particularly egregious when, as here, no public funds are used to pay for the land taken, but rather the transfer is financed entirely with funds provided by the very private interests--the condominium apartment lessees--to which the private property of the landowners will be immediately transferred. Thus, what Dartmouth Economics Professor William Fischel describes as a "self-limiting" aspect of the public use doctrine, the "budget-preserving instincts of governmental agencies" which make

eminent domain "expensive" as well as "expansive"[8] is entirely lacking in this case. If this simple reallocation of property rights represents a valid public purpose, then the Public Purpose Clause is dead.

3. Moreover, a local government is more easily "captured" by various special interests, including antilandlord interests as occurred in Honolulu. The result, once again, is legislative discrimination against the many small landowners who own the land under condominium apartment buildings, in favor of the (by definition) vastly superior numbers of condominium apartment owners. It is against this form of majoritarian tyranny that the Bill of Rights, including the Fifth Amendment's Takings Clause and its public purpose requirement, is supposed to guard.

4. Local government is more revenue-driven than state and federal government, and the result is more distortion in the land policy arena. Here, Honolulu shifted its public financial burden of assisting private, individual condominium owners in purchasing their leasehold interests to private landowners.

In sum, there are cogent and compelling reasons why the presumption in favor of state legislative decisionmaking should shift when the decisionmaker is a city or county council. Courts are constitutionally required to protect fundamental rights, and as this Court stated in *Dolan*, the Fifth Amendment's Takings Clause is in the same category as the First and Fourth Amendments. The presumption should also shift when the political process malfunctions, in order to protect groups not

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[8] William A. Fischel, *Regulatory Takings: Law, Economics and Politics* 74 (Harv. U. Press, 1995).

protected by principles of fundamental rights or suspect classifications.[9]

B. This Court Has Twice Previously Used a Less Deferential Standard in Reviewing Local Government Declarations of Public Purpose in Eminent Domain Cases

In *City of Cincinnati v. Vester*, the City sought to condemn land in excess of that needed to widen a city street. 281 U.S. at 441. As the landowners claimed, the lower courts determined that "the sole purpose of the city was the recoupment by the resale of the properties in question of a large part of the expense of the street widening." *Id.* at 444. This Court held that this purpose violated the constitutional rights of the plaintiffs upon the ground that it "was not a taking for a public use 'within the meaning of that term.'" *Id.* This Court noted that, although "great respect" is given to "legislative declarations and in particular the judgments of state courts as to the uses considered to be public in light of local exigencies[,]" the question of what is a public use remains a judicial one. *Id.* at 446.

Earlier, in *Rindge Co. v. Los Angeles County*, although this Court recognized that a taking of property for a highway has been a taking for public use from time immemorial, it objected to a California Civil Code provision that rendered a legislative determination of public use conclusive, so long as there was a vote of two-thirds of its members. 262 U.S. at 702. In its thorough analysis of whether the highway in question was a public use, the Court affirmed the well-settled principle that the question of public use is a judicial one.

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[9] *See, e.g., United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938), and the extensive and persuasive commentary on presumption-shifting in Daniel R. Mandelker & A. Dan Tarlock, *Shifting the Presumption of Constitutionality in Land-Use Law*, 24 Urb. Law. 1, 35-47 (Winter 1992).

Some state courts have followed this Court's lead in these two cases and specifically refused to apply the same deferential standard that this Court used in *Midkiff*. Thus, in *City of Center Line v. Chmelko*, 416 N.W.2d 401 (Mich. App. 1987), the Michigan Court of Appeals rejected a city public purpose declaration and held that the evidence demonstrated the taking was for the benefit of a private party. The city declared that the purpose for exercising its powers of eminent domain was to remove a blighted, deteriorating structure, to improve the tax base of the city, to stabilize the commercial district, and to remove a nonconforming use (under the local zoning ordinance). For that purpose, it would transfer the condemned land to a private developer "for commercial purposes in a manner that will improve the economic viability of the existing commercial district of the City, and that will improve and stabilize property values." 416 N.W.2d at 403.

Finding that the alleged public purpose was largely "a fiction," the Michigan court held that the "instant case is one in which 'heightened scrutiny' should apply [because] the record readily indicate[d] that the land, if condemned, would be made available to a private party." *Id.* In reaching this decision, the court expressly relied on the "line of Supreme Court cases" including the *Vester* and *Rindge* cases. Furthermore:

> We note that the cases upholding the deference given to legislative determinations involve a congressional decision or a state legislative determination upheld by a state court. However, in *Cincinnati v. Vester*, *supra*, the case most similar to our facts, the Court rejected a city resolution of public purpose. While concluding that legislative declarations of local factors was due great deference, the Court ruled that public use was ultimately a judicial question.

Chmelko, 416 N.W.2d at 405. In 1993, the Michigan Supreme Court struck down a condemnation of two properties that refused access to a licensed cable operator. In *City of Lansing v. Edward Rose Realty Inc.*, 502 N.W.2d 638 (Mich. 1993), the Court

applied a heightened scrutiny standard to the city's declaration of public purpose because the exercise of eminent domain would benefit another specific private interest. Once again citing this Court's opinion in *Vester*, the court held that "[m]ere statements that a proposed action furthers a public benefit are not conclusive." 502 N.W.2d at 642.

The judiciary's quintessential role of judicial review in these instances is further reflected in 2A Julius L. Sackman, *Nichols on Eminent Domain* § 7.08[2]; *See also Green v. High Ridge Association, Inc.*, 695 A.2d 125, 128-29 (Md. App. 1997) (finding that determination of public use is judicial); *City of Wheaton v. Sandberg*, 574 N.E.2d 697, 700-02 (App. Ill. 1991) (determining that court has a role of judicial review and holding ordinance vague and overbroad); *Denihan Enterprises, Inc. v. O'Dwyer*, 99 N.E.2d 235, 238-39 (N.Y. App. 1951) (holding that asserted public use was reviewable and that private use was primary--public benefit incidental); *Kessler v. City of Indianapolis*, 157 N.E. 547, 549 (Ind. 1927) (holding that evidence showed that real reason was to take private land for private purpose); *Fountain Park Co. v. Hensler*, 155 N.E. 465, 470 (Ind. 1927).

> [T]he question whether the constitutional provisions against the taking of property for private use have been violated is, like all constitutional questions, ultimately for the courts, and if a court can clearly see that a particular undertaking of eminent domain has no real and substantial relation to the public use, it is the duty of the court to intervene.

Id. Although courts traditionally give deference to legislative bodies, "the propriety of the taking is ultimately a judicial question . . . ."[10]

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[10] 7 Patrick J. Rohan & Melvin A. Reskin, *Nichols on Eminent Domain* § 2.07[3].

CONCLUSION

We therefore respectfully urge this Court to review this case and to affirm that the burden of proof should be shifted and a less deferential standard applied to local declarations of public purpose. We also respectfully urge this Court to find that, as a result of such an affirmation and application of such a standard, Honolulu clearly violated the Public Purpose Clause of the Fifth Amendment in using its powers of eminent domain to take land from one group of landowners and transfer it to another larger group in the name of land reform.

DATED: June, 1998.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

SMALL LANDOWNERS OF OAHU, and RICHARD S. H. WONG, OSWALD K. STENDER, MARION M. L. LINDSEY, GERARD A. JERVIS, and HENRY H. PETERS, in their capacities as Trustees of the Kamehameha Schools Bernice Pauahi Bishop Estate,

Petitioners,

v.

CITY AND COUNTY OF HONOLULU, and HAWAII EQUITY LEASEHOLDERS' COALITION, a Hawaii non-profit corporation,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF OF PETITIONERS

Although eager to relegate the Fifth Amendment's "public use" requirement to the status of a "poor relation" within the Bill of Rights, *Dolan* v. *City of Tigard*, 512 U.S. 374, 392 (1994), respondents City and County of Honolulu ("City") and Hawaii Equity Leaseholders' Coalition ("HALE Coalition") (collectively, "respondents") largely ignore the questions presented and instead argue points that are both undisputed and irrelevant to whether review should be granted. Once respondents' lengthy reiterations of the City Council's findings and of the decision in *Hawaii Housing Authority* v. *Midkiff*, 467 U.S. 229 (1984)—neither of which supports denial of the petition because they are precisely what is at issue in the petition—are set aside, what remains is a case that squarely presents the important and recurring constitutional issue of whether the deferential, rational-basis standard set forth in *Midkiff* should apply reflexively to *all* Fifth Amendment takings, regardless of the attendant circumstances, of whether closer scrutiny is warranted when traditional surrogate assurances of "public use" are absent. Respondents' submissions confirm that this case provides an ideal vehicle for addressing and resolving these questions.

1. Although respondents focus their attention on larger landowners, Ordinance No. 91-95 draws no distinctions between large and small property owners. Pet. App. 110a (" 'Development' means an area of land, irrespective of size"). Indeed, respondents nowhere dispute that the vast majority of the landowners affected will be those who own fee land beneath a single condominium project. Pet. App. 162a (89% of the 466 landowners own land under a single condominium project). Their plight is compelling:

> My grandparents had a dream to keep their estate together. Ever since my father was in high school, this land helped my grandparent support 17 children and many hanai children. Years of labor were put into working this land. Now, since the passing of

> my grandparent, my family has stayed united to keep the estate.

Pet. App. 179a; *id.* at 187a ("My family of three had to sacrifice many hardships, first to fill the coral land with dirt. Next came telephone, electricity, sidewalks and curbs [w]hich took us years to pay up. I'd like to give my land to my daughter"); *id.* at 179a-190a (collecting sample accounts). Thus, it is undisputed that Ordinance No. 91-95 will force many Native Hawaiians, whose families have owned the same land for generations, to sever that bond under threat of legal sanction to satisfy the private desires of a more numerous and politically influential group of condominium owners.

To be sure, the Just Compensation Clause ensures that landowners (after bearing the uncompensated burden and expense of a trial to determine the economic worth of their land) must be paid fair market value when their land is taken from them. U.S. Const. amend. V. But, as the Court has recently reconfirmed, "property is more than economic value . . . , it also consists of 'the group of rights which the so-called owner exercises in his dominion over the physical thing,' such 'as the right to possess, use and dispose of it.'" *Phillips* v. *Washington Legal Found.*, 118 S. Ct. 1925, 1933 (1998) (quoting *United States* v. *General Motors Corp.*, 323 U.S. 373, 378 (1945)). As to those important, non-economic possessory interests, the Just Compensation Clause provides petitioners with little, if any, protection against illegitimate expropriation. Instead, the Public Use Clause is their only safeguard; it entitles petitioners to judicial confirmation that their property rights will not be invaded to serve some illegitimate "private" purpose. It is against this backdrop that petitioners' arguments regarding the proper contours of the "public use" requirement must be assessed.

2. Respondents' essential contention is that the lower courts' application of this Court's decision in *Midkiff* presents an insurmountable barrier to review. Given the primary thrust of their arguments, it is important to reiterate precisely what questions are presented.

Contrary to respondents' suggestions, petitioners do *not* seek relitigation of the lower courts' application of the deferential, rational-basis standard set forth in *Midkiff*. See Intervenor's Brief in Opposition to Petition for Writ of Certiorari 9-15 (arguing that "[t]he lower courts properly applied *Midkiff*") ("HALE Brief").[1] Rather, this case presents the entirely distinct issue of whether *Midkiff* "should be limited to the extent it suggests that deferential, rational-basis review is appropriate for all compensated takings of private property." Pet. i. As a result, respondents' extended arguments analyzing whether the court of appeals properly held that the City's boilerplate legislative findings were sufficient to satisfy *Midkiff* are irrelevant. See, *e.g.*, HALE Brief 10-15; City's Opposition to Petition for Writ of Certiorari 10-11 ("City Brief"). Rather, the crux of petitioners' claim is that application of *Midkiff*'s rational-basis review in all circumstances is inappropriate because such blanket deference would guarantee that virtually any claimed "public purpose," however flimsy, will be sufficient to insulate a taking of property from challenge under the Public Use Clause. Cf. *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1026 n.12 (1992) ("the Takings Clause requires courts to do more than insist upon artful harm-preventing characterizations"); *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 841 (1987) (compliance with Takings Clause is "more than a pleading requirement" satisfied by "an exercise in cleverness and imagination").

In this respect, respondents' recitation of and reliance on the City's findings regarding "public purpose" are telling. For example, the HALE Coalition argues that Ordinance No. 91-95 satisfies *Midkiff* because the City Council announced that forcing landowners to sell their property to condominium owners would " 'promote the economy of Oahu and public interest, health, welfare, security and

[1] Although petitioners included intervenor HALE Coalition in their List of Parties, Pet. ii, the HALE Coalition inadvertently was omitted from the cover of the Petition for Writ of Certiorari.

happiness of such lessees and owners,' " HALE Brief 11 (quoting Pet. App. 107a), and would "advance the public interest and maintain a 'secure, strong and stable Oahu economy,' " *id.* at 12 (quoting Pet. App. 108a). Under *Midkiff*'s " 'extremely narrow' " review, 467 U.S. at 240 (quoting *Berman* v. *Parker,* 348 U.S. 26, 32 (1954)), such generalized findings, if accepted, are sufficient to support the conclusion that Ordinance No. 91-95 is "rationally related to a conceivable public purpose," *id.* at 241, and therefore not "proscribed by the Public Use Clause," *id.*

But it is precisely because application of the deferential standards set forth in *Midkiff invariably* will lead to this same conclusion—even where, as here, the alleged "public purposes" could not withstand even modest testing against the facts—that those standards warrant modification in certain limited circumstances. Cf. *Dolan* v. *City of Tigard,* 512 U.S. 374, 395-96 (1994) (rejecting City's reliance on "conclusory statement[s]" in support of "findings" and requiring City "to quantify its findings").[2] As a result, petitioners seek review *not* to have this Court reapply deferential scrutiny, but to establish that closer scrutiny is warranted to test adequately the "public use" justifications advanced by a local legislature, in support of an ordinance that results in no social surplus, employs no public funds and is intended for the express purpose of " 'tak[ing] *property* from A. and giv[ing] it to B.' " *Eastern Enters.* v. *Apfel,* 118 S. Ct. 2131, 2146 (1998) (plurality) (O'Connor, J.) (quoting *Calder* v. *Bull,* 3 U.S. (3 Dall.) 386, 388 (1798) (Chase, J.)). Against this showing, respondents have virtually nothing to say, except

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[2] In other contexts, the Court has not hesitated to employ closer scrutiny to determine "which [actions] are constitutionally objectionable and which are not." *Adarand Constructors, Inc.* v. *Pena,* 515 U.S. 200, 228 (1995) ("strict scrutiny" necessary to " 'differentiate between' permissible and impermissible" action); *City of Richmond* v. *J.A. Croson Co.,* 488 U.S. 469, 493 (1989) ("searching judicial inquiry" necessary to " 'smoke out' " illegitimate government action) (plurality) (O'Connor, J.).

to insist that *Midkiff* itself does not provide for heightened scrutiny under any circumstances—which is the precise reason this case warrants review.

3. Notwithstanding the HALE Coalition's conclusory argument that Ordinance No. 91-95 is constitutional "under any test, . . . rational-basis or strict scrutiny," HALE Brief 15, the level of review is critical. For example, the HALE Coalition argues that "the City's use of its power of eminent domain to prevent a housing crisis resulting from a dispossession of the apartment-owners who could not afford the renegotiated rent was a valid 'public purpose.'" *Id.*[3] Closer analysis of this justification is fatal to Ordinance No. 91-95. Specifically, because the statute "does not provide for direct public money to purchase the lease fee," HALE Brief 18, the only condominium-owners who can take advantage of Ordinance No. 91-95 are those who can afford to buy the land in fee. See Pet. App. 119a-120a. Try as they might, see City Brief 11, respondents simply cannot explain how condominium owners who are unable to afford the rent could conceivably afford to pay the even higher costs associated with buying the land.

Similarly, with respect to the core claim of "public purpose" advanced by the City—*i.e.*, to "encourag[e] a free market in fee simple housing," City Brief 13—any quantum of heightened scrutiny is fatal to the constitutionality of Ordinance No. 91-95. In the court of appeals, Judge O'Scannlain explained that application of closer scrutiny revealed that Ordinance No. 91-95 was "nothing

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[3] Respondents repeatedly imply that renegotiation of long-term leases is unfair and would result in large increases in the rent being paid by owner occupants. *See, e.g.*, City Brief 11; HALE Brief 14. Yet, respondents do not dispute that the renegotiated rents reflect the fair market value of the land. Accordingly, respondents' claims that some of these rents will be "several hundred percent over and above their present rent," *id.*, confirms that the occupant-owners have for many years benefited from below-market rents and that landowners are being forced to sell just as they begin to earn a market-driven return on investment.

more than a naked transfer from one property owner to another." Pet. App. 37a (O'Scannlain, J., concurring and dissenting). Indeed, given the conspicuous absence of any finding of oligopoly, Judge O'Scannlain concluded that Ordinance No. 91-95 "will not change the value of the property" and "has nothing to do with changing the structure of Hawaii's real estate market." *Id.*

Undoubtedly aware that closer scrutiny would be fatal to Ordinance No. 91-95, the City falls back on claims that adoption of a "new 'heightened scrutiny' standard for evaluation of some [takings]" would be "unworkable," would embroil the courts in " 'empirical debates' " and would require the Court to "second gues[s]" the "wisdom of the ordinance." City Brief 14. None of these merits-related arguments militates against a grant of certiorari to consider whether heightened scrutiny is appropriate. In addition, none of them provides a persuasive reason for adhering to across-the-board deferential review.

First, the Court traditionally has varied the applicable constitutional standards, notwithstanding the difficult judgments associated with heightened scrutiny, where necessary to ensure faithful application and protection of important constitutional guarantees. See *Adarand*, 515 U.S. at 235 (racial classification subject to strict scrutiny); *Craig* v. *Boren*, 429 U.S. 190, 197 (1976) (gender classification subject to intermediate scrutiny); *City of Cleburne* v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446 (1985) (classification based on mental retardation subject to rational-basis review).[4] *Second*, to the extent that closer scrutiny under the Public Use Clause would require resolution of difficult issues not always susceptible to resolution through application of uniform bright-line

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[4] *See also Cohen* v. *California*, 403 U.S. 15, 26 (1971) (setting forth strict standards for analyzing regulation of political speech); *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557, 566 (1980) (setting forth lower standard for analyzing regulation of commercial speech); *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571-72 (1942) (explaining absence of protection for " 'fighting' words" under the First Amendment).

standards, courts already are called upon to resolve such questions when assessing whether governmental action "goes too far" and therefore constitutes a regulatory taking of private property under the Fifth Amendment. See *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922); see also *Eastern Enters.*, 118 S. Ct. at 2146 (whether government action constitutes a taking "does not lend itself to any set formula" and "is essentially ad hoc and fact intensive") (plurality) (O'Connor, J.); *Penn Cent. Transp. Co.* v. *New York City*, 438 U.S. 104, 124 (1978) (rejecting any "set formula" in favor of "ad hoc, factual inquiries" in assessing whether government action constitutes a taking of private property). Indeed, the requirement that courts sometimes "second-guess" the legislature's conclusions regarding the constitutionality of government action is inherent in judicial review. *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 630 (1989) (O'Connor, J., concurring) ("We cannot avoid the obligation to draw lines, often close and difficult lines" when protecting constitutional rights). In contrast, the legal certainty that respondents demand could be guaranteed only through non-enforcement of important and express constitutional protections. Cf. *United States* v. *Lopez*, 514 U.S. 549, 566 (1995) (judicial enforcement of constitutional guarantees "always will engender 'legal uncertainty' "). *Finally*, adoption of heightened scrutiny in a limited number of circumstances would not embroil courts in "empirical debates over the wisdom of takings," *Midkiff*, 467 U.S. at 243, but instead would require that they take a closer look to assure that takings of private property unaccompanied by traditional guarantees of "public purpose" are justified by a legitimate legislative objective.

In short, application of closer scrutiny in this case would allow the Court to assess whether the "real purpose" underlying Ordinance No. 91-95 is, as the HALE Coalition candidly (if inadvertently) concedes, nothing but an illegitimate attempt to "facilitat[e] the transfer of the fee

simple interest from the ground lessors who refuse to sell to the owner-occupants." HALE Brief 11.

4. Similarly misguided is respondents' argument that the absence of conflict among the lower courts is an insurmountable obstacle to review. City Brief 11-15. In fact, the basis upon which petitioners seek review—*i.e.*, the overbroad application of *Midkiff* deference to all compensated takings—is the very reason that no conflict among the courts of appeals or state supreme courts could develop. Put another way, the broad and deferential standards set forth in *Midkiff* have precluded any conflict by effectively insulating *all* takings of private property from challenge under the Public Use Clause. Quite apart from the nature of petitioners' challenge, the absence of conflict has never been held to preclude reexamination of a prior decision on an important issue of constitutional law, especially where that decision is in "tension" with more recent precedent. See Pet. App. 33a (O'Scannlain, J., concurring and dissenting); *Agostini* v. *Felton*, 117 S. Ct. 1997, 2016 (1997) (confirming willingness to revisit decisions based on "subsequent development of our constitutional law" because the Court's "interpretation can be altered only by constitutional amendment or by overruling our prior decisions").

5. Unable to set forth a persuasive reason why review should be denied, respondents instead argue, on the merits, that the objective factors identified by petitioners that warrant heightened scrutiny should be rejected. See City Brief 15-17; HALE Brief 15-16. In particular, the City contends that the Court should not consider whether *Midkiff* applies in all circumstances because the distinctions between this case and *Midkiff* do not support adoption of a separate constitutional standard. City Brief 15. To support these claims, respondents manipulate the record to suggest that the underlying legal conclusions reached in *Midkiff* also should apply here. *Id.* These efforts actually underscore the important differences between this case and *Midkiff*.

First, as the court of appeals confirmed, unlike the statute in *Midkiff*, Ordinance No. 91-95 was "not grounded on the desire of breaking up a land oligopoly," Pet. App. 13a, but to "facilitat[e] the transfer of the fee simple interest from the ground lessors who refuse to sell to the owner-occupants," HALE Brief 11. As a result, the *Midkiff* Court's conclusion that "[r]egulating oligopoly and the evils associated with it is a classic exercise of a State's police powers," 467 U.S. at 242, simply has no application in this case. Thus, the City is wrong when it contends that the transfer of property here "was exactly the situation in the *Midkiff* case." City Brief 16.[5]

Second, given that the statute in *Midkiff* was unquestionably designed to combat the artificially inflated land prices associated with oligopoly, the absence of any infusion of public funds was consistent with the State's expressed public purpose of facilitating the transfer of property to parties willing and able to pay fair market value for the land. In the absence of oligopoly, however, the failure of the local legislature to contribute public funds not only deprives Ordinance No. 91-95 of a presumption that it was designed to advance a public purpose, see *United States* v. *Gettysburg Elec. Ry.*, 160 U.S. 668, 680 (1896), but also refutes the City's claim that it was promulgated to assist owner-occupants who could not afford to pay the market-based rents to purchase the land beneath their condominium units—land whose fair market value for just compensation purposes is based in large part on those rents. Thus, the absence of public funds in this

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[5] Respondents pepper their briefs with comparisons using mismatched data to argue that the concentration of ownership of land here is little different from that in *Midkiff*. *See, e.g.*, City Brief 3; HALE Brief 14-15. The fact remains that in *Midkiff*, "22 landowners owned 72.5% of the fee simple titles," 467 U.S. at 232, whereas here, 466 different landowners owned the land underneath 754 condominium complexes, and the largest 60 landowners accounted for just over 50% of the total condominium units. Pet. App. 162a, 192a. Thus, the court of appeals was correct to conclude that Ordinance No. 91-95 is not necessary to break up any land oligopoly. Pet. App. 13a.

case confirms that the "real purpose" of Ordinance No. 91-95 was simply to coerce one private party to transfer its land to a more numerous and politically well-positioned private party. Pet. App. 37a.

Finally, unlike the state-wide program at issue in *Midkiff*, Ordinance No. 91-95 was passed at the local level, by a unicameral body in which every member acknowledged a personal stake in the legislation. Pet. App. 173a. That fact is critical given that "[a]n acute awareness of the heightened danger of oppression from political factions in small, rather than large, political units dates to the very beginning of our national history." *J.A. Croson*, 488 U.S. at 523 (Scalia, J., concurring); see also The Federalist No. 10 (James Madison). Indeed, the Court's recent Fifth Amendment jurisprudence has demanded closer scrutiny of localized government action relating to private property rights under the Fifth Amendment. See *Dolan*, 512 U.S. at 391 (requiring City to demonstrate "rough proportionality").

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

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